Supreme Court, U.S.
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No. 01-301

IN THE

Supreme Court of the United States

ANTHONY NEWLAND,

Petitioner,

v.

TONY EUGENE SAFFOLD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

SETH P. WAXMAN
DAVID W. OGDEN
TREVOR W. MORRISON
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

MARY KATHERINE MCCOMB
Counsel of Record
OFFICE OF STATE PUBLIC DEFENDER
801 K Street, Suite 1100
Sacramento, CA 95814
(916) 322-2676

Counsel for Respondent Tony Eugene Saffold

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Section 2244(d)(2) of Title 28, United States Code, provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." The questions presented are:

1. Whether the Ninth Circuit was correct to adopt the unanimous interpretation of courts of appeals throughout the country that a state habeas petition is pending from the initial filing of the petition until the final resolution of any timely requests for review.

2. Whether the Ninth Circuit correctly construed Respondent Saffold's petition to the state supreme court as timely filed where the state's timeliness rules do not establish that it was untimely, and where the state supreme court's denial of the prisoner's petition reached the merits and did not clearly deem it to be untimely.

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The amended opinion of the court of appeals (Pet. App. A) is reported at 250 F.3d 1262. The findings and recommendations of the magistrate judge (Pet. App. F) and the order of the district court adopting those findings and recommendations (Pet. App. E) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2001. The petition for a writ of certiorari was filed on August 20, 2001, and was granted on October 15, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2244(d) of Title 28, United States Code, provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

Following a jury trial in San Joaquin County, California, Respondent Tony Eugene Saffold was convicted of murder and robbery. J.A. 1. His conviction became final after direct appeal on April 20, 1992. *Id.* 1, 6. On April 24, 1996, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214, became effective. AEDPA imposed a new one-year limitations period on all petitions for writ of habeas corpus filed under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(d)(1). The statute also provided for the tolling of that limitations period for "[t]he time during which a properly filed application for State post-conviction or other collateral review . . . is pending." *Id.* § 2244(d)(2).

On April 17, 1997, Mr. Saffold, acting *pro se*, delivered to prison authorities a petition for writ of habeas corpus for filing with the San Joaquin Superior Court, raising claims of ineffective assistance of counsel. J.A. 8-16; 75; Pet. App. A-2, 14. In a written opinion dated June 9, 1997, the superior court denied all of Mr. Saffold's claims on the merits. Pet. App A-9; J.A. 2, 18-20. On June 14, 1997, Mr. Saffold, still acting *pro se*, followed the accepted procedure in California for seeking intermediate court review of the claims raised in his superior court petition by delivering to prison authorities an original petition for writ of habeas corpus for filing with the California Court of Appeal. J.A. 21-29, 78; *see generally* Cal. Const., art. VI, § 10. On June 26, 1997, the court of appeal summarily denied the petition on the merits. J.A. 1, 30.

According to Mr. Saffold's unrebutted declaration, he was not notified of the court of appeal's denial of his petition until November 10, 1997, about four and one-half months after the decision. Pet. App. A-9 n.3; J.A. 79. California law provides two alternative methods for seeking the state supreme court's review of a court of appeal's denial of a habeas corpus petition: the prisoner may file a petition for review within ten days of the court of appeal's decision, *see* Cal. Penal Code § 1506; Cal. Rules of Ct. 24(a), 28(b), or he may file an original petition for a writ of habeas corpus within a reasonable time, *see In re Harris*, 855 P.2d 391, 398 n.7 (Cal. 1993). By the time Mr. Saffold learned of the court of appeal's denial in his case, it was too late to file a petition for review. Still acting *pro se*, Mr. Saffold therefore sought the California Supreme Court's review by delivering to prison authorities an original habeas petition to be filed with the state high court, again raising ineffective assistance of counsel claims. J.A. 31-39. Mr. Saffold delivered that petition for filing on the same day he received notice of the previous court's denial. *Id.* 78. It was formally filed three days later, on November 13, 1997. *Id.* 31.

The California Supreme Court denied Mr. Saffold's petition on May 27, 1998. Pet. App. G-1. The order denying the petition read in its entirety: "Petition for writ of habeas corpus DENIED on the merits and for lack of diligence." *Id.*

Still proceeding *pro se*, Mr. Saffold filed his first federal petition for a writ of habeas corpus on June 4, 1998. J.A. 3, 65. The district court dismissed Mr. Saffold's petition on the ground that AEDPA's one-year limitation period had expired. J.A. 3; Pet. App. E-2, F-8. The district court held that the statute of limitations had been tolled under 28 U.S.C. § 2244(d)(2) only while each state court had a petition actually under consideration. Pet. App. A-9, F-4-6. Thus, the district court excluded from tolling both the short period between the superior court's denial of Mr. Saffold's petition and the filing of his petition with the state court of appeal, and also the four and one-half month interval between the

court of appeal's decision and filing of Mr. Saffold's petition with the California Supreme Court. *Id.*

On appeal from the district court's dismissal, the Ninth Circuit followed its decision in *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000), which held that the statute of limitation is tolled under section 2244(d)(2) for "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application." Pet. App. A-10 (quoting *Nino*, 183 F.3d at 1006 (emphasis omitted)).[1] The court also observed that its decision in *Nino* had reserved the question "whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims." *Id.* A-10-11 (quoting *Nino*, 183 F.3d at 1006 n.4).

Applying the standard it had adopted in *Nino*, the Ninth Circuit held that the brief period between the superior court's decision and the filing of Mr. Saffold's petition in the court of appeal should have been tolled. *Id.* A-10. Turning to the interval between the court of appeal's decision and Mr. Saffold's filing in the state supreme court, the court first made clear that the case did not present "the question that *Nino* left open." *Id.* A-11. That is, the court concluded that this case does not present the question whether the federal limitations period is tolled during the period between a state court's denial of a habeas petition and the filing of an *untimely* appeal.

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1 The court also expressed its agreement with the similar rule adopted by the Second Circuit in *Bennett v. Artuz*, 199 F.3d 116 (2d Cir.1999), *aff'd*, 531 U.S. 4 (2000), that "a state-court petition is 'pending' from the time it is first filed until finally disposed of and further appellate review is unavailable under the particular state's procedures." *Id.* at 120. The court explained that application of the Second Circuit's formulation also yielded tolling in this case, because appellate review was not yet unavailable to Mr. Saffold when he filed his petition with the California Supreme Court. Pet. App. A-12-13 n. 8.

The court reached that conclusion after noting, first, that the purpose of AEDPA's tolling provision is to permit state courts to address the merits of a prisoner's claims, and that the California Supreme Court had addressed the merits of Mr. Saffold's claim. *Id.* Second, the court found ambiguous the reference in the California Supreme Court's order to a "lack of diligence." The court noted that although the reference might have been to the four and one-half months between the court of appeal's decision and the filing of his petition in the California Supreme Court, it might also have been to the five years that elapsed between the finality of Mr. Saffold's conviction and the filing of his first state habeas petition. *Id.* A-11-12. Deciphering the import of that reference was particularly difficult, the court concluded, because California's timeliness standards for habeas petitions were not consistently applied at the time Mr. Saffold's conviction became final. *Id.* A-12 n.7.

In light of the absence of any clear standard in California law dictating that Mr. Saffold's pursuit of state post-conviction relief was untimely, the ambiguity of the California Supreme Court's order, and the indisputable fact that the California Supreme Court did reach the merits of at least some of Mr. Saffold's claims, the Ninth Circuit declined to construe the California Supreme Court's denial of Mr. Saffold's petition as a denial for untimeliness. Accordingly, under the rule previously articulated by the Ninth Circuit in *Nino*, the court ruled that Mr. Saffold's pursuit of state collateral review had been "pending" within the meaning of section 2244(d)(2), and AEDPA's statute of limitations thus tolled, from the filing of Mr. Saffold's habeas petition in the superior court until the denial of his petition in the California Supreme Court. *Id.* A-12-13. The court then remanded the case to the district court to determine whether Mr. Saffold's

federal habeas petition had thus been filed within the one-year limitations period. *Id.* A-14.[2]

Judge O'Scannlain's dissenting opinion embraced the position that a state habeas petition remains "pending" for purposes of section 2244(d)(2) during the time that a prisoner is "properly pursuing his state-post conviction remedies" on appeal, until the time for such appeals expires and "further appellate review is unavailable under the particular state's procedures." *Id.* A-16 & n.1 (quoting *Nino*, 183 F.3d at 1006 n.4, and *Bennett*, 199 F.3d at 120). But the dissent disagreed with the majority about the appropriate application of the Ninth Circuit's decision in *Nino* to the instant case. The dissent maintained that Mr. Saffold had not been "properly pursuing his state post-conviction remedies" during the interval between the court of appeal's decision and the filing of his petition in the California Supreme Court, and concluded therefore that AEDPA's limitations period should not have been tolled during that time. *Id.* A-16-17.

In his petition for writ of certiorari, Petitioner Newland, then-Warden of California State Prison, Solano ("the Warden"), characterized the Ninth Circuit's decision in this case as permitting "tolling for any length of time despite a petitioner's dilatory behavior and a state court rejection of the petition on the ground of delay as long as the state court also addresses the merits of the claim." Pet. 9. That rule, the Warden contended, conflicts with the approach taken by the Seventh Circuit in *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000). *Fernandez* reasoned that "[i]t is sensible to say that a petition continues to be 'pending' during the period between one court's decision and a timely request for further

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2 Because the Ninth Circuit concluded that Mr. Saffold was entitled to statutory tolling, it did not address his argument that he is entitled to equitable tolling because of the delay in notifying him of the decision of the California Court of Appeal. Pet. App. 13 n. 9. The equitable tolling issue is not now before this Court, and remains to be resolved on remand if necessary.

review by a higher court (provided that such a request is filed); it is not sensible to say that the petition continues to be 'pending' after the time for further review has expired without action to continue the litigation." 227 F.3d at 980. Implicitly approving of *Fernandez* and relying on it as proof that the Ninth Circuit's decision below created a split among the circuits on the question whether an untimely state habeas petition is "pending" under the statute, the Warden sought this Court's review of the question "[w]hether the time during which a petitioner failed to properly pursue his state collateral remedies falls within the meaning of 'pending' set forth by 28 U.S.C. § 2244(d)(2). . . ." Pet. i.

This Court having granted certiorari to review the question that the Warden presented, the Warden now shifts ground to argue that the question whether a state prisoner is properly pursuing his state collateral remedies on appeal should have no bearing on section 2244(d)(2)'s tolling provision. *See, e.g.*, Br. 7-8, 31, 49. Arguing (Br. 8, 36-49) that every court of appeals to have addressed the issue—including the Seventh Circuit in *Fernandez*—has interpreted section 2244(d)(2) incorrectly, the Warden now relies principally upon a single district court opinion[3] to contend that a state petition for post-conviction review is pending only after it has been filed with a particular court and while it is awaiting that court's decision. Thus, the Warden urges the Court to conclude that a state petition for collateral review does not remain "pending" during the time allowed under state law for appealing a denial of the petition, even where the prisoner files an appeal within that time.

SUMMARY OF ARGUMENT

Every court of appeals to have considered the issue has correctly concluded that a state application for collateral review is "pending" within the meaning of 28 U.S.C. § 2244(d)(2), and AEDPA's one-year statute of limitations

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3 *Robinson v. Ricks*, 163 F. Supp. 2d 155 (E.D.N.Y. 2001).

for federal habeas corpus petitions is thus tolled, from the time the application is filed until the final disposition of any timely appeal relating to the application. The Warden's invitation to discard this unanimous interpretation and to conclude instead that section 2244(d)(2) provides tolling only for the periods during which a state petition is actually before a court awaiting decision—and not during the time allotted under state law to appeal from such a decision—lacks merit and should be rejected.

I. The unanimous position of the courts of appeals is strongly supported by the plain text of section 2244(d)(2). The statute refers to the time during which a state application for collateral review is "pending," thus employing a term whose plain meaning and common judicial use encompass all the time from the filing of a case until the final resolution of any timely appeals. In addition, the statute's reference to the "time" that an "application" is pending confirms that a prisoner's request for collateral review remains pending during one continuous period of time, and not, as the Warden contends, only during the series of disconnected periods in which successive submissions are before various courts awaiting decision. Moreover, the Warden is unsuccessful in his attempt to buttress his reading of section 2244(d)(2) by contrasting its text with the texts of other sections of the statute: He fails to establish that the various verbal formulations employed in diverse sections of AEDPA reflect any of the differences in meaning he attributes to them, and he simply ignores the legislative aims and processes that produced such variations in the first place.

Consideration of the purposes of AEDPA confirms the plain meaning of section 2244(d)(2). AEDPA aims to "further the principles of comity, finality, and federalism," *Duncan v. Walker*, 121 S. Ct. 2120, 2127 (2001) (internal quotation marks omitted). Section 2244(d)(2) balances these principles: it gives prisoners an incentive to exhaust their state remedies by tolling the federal statute of limitations "while state remedies are being pursued," *id.* at 2128, and it promotes finality by according tolling only to "properly filed" applications for state collateral review, *id.* Here, the court of appeals' unanimous approach respects these goals by providing for a prompt, orderly, and proper use of the state courts prior to the filing of a federal habeas petition. The Warden's construction of section 2244(d)(2), in contrast, disserves the principles of federalism and comity by encouraging state prisoners either to file their federal habeas petitions prematurely to ensure that they do not exceed the one-year limitations period, or to rush through the state collateral review process in a way that is unlikely to afford the state courts a "full and fair" opportunity to pass on the prisoner's claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). The consequences of the Warden's construction would be particularly perverse in cases where the prisoner prevails in his state habeas petition at the trial court level, and the state seeks to appeal. Under the Warden's view, the limitations period would not be tolled even in that situation, thus penalizing the state prisoner for the time taken *by the state* to prepare its appeal and inducing the prisoner to file a federal petition to preserve his rights during that period of time. By encouraging premature recourse to federal court even where the state courts are apparently addressing the constitutional defects a petitioner complains about, the Warden's construction is particularly offensive to AEDPA's policy of not creating any "diminution of statutory incentives" to exhaust state remedies before proceeding to federal court. *Duncan*, 121 S. Ct. at 2128.

II. California does not have a system of conventional appeals through which a state habeas petitioner may seek appellate review of his petition. Instead, each principal level of court in California has original jurisdiction in habeas corpus, and the filing of successive petitions in the higher courts is the functional equivalent of filing appeals in those courts. Moreover, California law does not precisely specify the time for filing habeas petitions, whether in the superior court or in the higher courts. Rather, such petitions are subject to a gen-

eral requirement that they be filed "within a reasonable time." Accordingly, the time that a California prisoner spends seeking appellate review of his state habeas petition is time that his post-conviction proceedings are "pending" within the meaning of section 2244(d)(2), provided he seeks such review within a reasonable time.

III. Here, the Ninth Circuit correctly held that Mr. Saffold is entitled to tolling pursuant to section 2244(d)(2) for the entire period between the filing of his habeas petition in the state superior court and the issuance of the California Supreme Court's one-line order denying his petition to that court. In particular, the Ninth Circuit was correct to proceed on the basis that the four and one-half month interval between the state court of appeal's decision and the filing of his petition in the California Supreme Court did not render the petition untimely under California's requirement that such filings be made "within a reasonable time."

First, the Warden cites no rule establishing that the interval between the court of appeal's decision and the filing of Mr. Saffold's petition in the state supreme court was an "unreasonable" delay. Indeed, the California Supreme Court has adjudicated numerous petitions for habeas corpus filed many months after the court of appeal's decision on the merits, without giving any indication that such an interval caused the petition to be untimely. Second, the California Supreme Court's one-line order denying Mr. Saffold's petition "on the merits and for lack of diligence" did not clearly rule his petition to be out of time. The precise import of the court's reference to a "lack of diligence" is obscure. Third, the Ninth Circuit itself did not conclude that the California Supreme Court denied the petition for untimeliness. Rather, as the Ninth Circuit confirmed in a subsequent decision, the court in this case "viewed the California Supreme Court as having recognized the petitioner's use of post-conviction relief procedures to have been 'proper,' and thus within AEDPA's tolling provision." *Welch v. Newland*, 267 F.3d 1013, 1017,

(9th Cir. 2001), *mandate stayed*, 268 F.3d 1124 (9th Cir. 2001).

Given the absence of any fixed time limitation in California's collateral relief procedures, the ambiguity of the California Supreme Court's order in this case, and the undisputed fact that the California Supreme Court reached the merits of at least some of Mr. Saffold's claims, the Ninth Circuit was correct to proceed on the basis that Mr. Saffold's petition to the California Supreme Court was timely. This Court should not disturb the court of appeal's judgment on this issue, but should instead either defer to its analysis of state law, *see UNUM Life Ins. Co. v. Ward*, 526 U.S. 358, 368 (1999), or dismiss the writ as improvidently granted. At most, this Court should remand the case for further proceedings to determine conclusively whether Mr. Saffold's petition to the California Supreme Court was timely.

ARGUMENT

I. A STATE APPLICATION FOR COLLATERAL REVIEW IS "PENDING" UNDER 28 U.S.C. § 2244(d)(2) DURING THE TIME ALLOTTED BY STATE LAW FOR SEEKING APPELLATE REVIEW OF THE APPLICATION, IF SUCH REVIEW IS TIMELY SOUGHT.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214, established a one-year statute of limitations for the filing of federal habeas corpus petitions by persons held in state custody. *See* 28 U.S.C. § 2244(d)(1).[4] AEDPA also provided that the limitations period shall be tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral

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[4] For prisoners, such as Respondent Saffold, whose convictions became final prior to AEDPA, the one-year limitations period began to run on April 24, 1996, the day AEDPA was enacted. *See Duncan v. Walker*, 121 S. Ct. 2120, 2130 & n.1 (2001) (Stevens, J., concurring in part and concurring in the judgment) (collecting court of appeals decisions so holding).

review with respect to the pertinent judgment or claim is pending." *Id.* § 2244(d)(2). As this Court has observed, section 2244(d)(2)'s tolling provision contributes to AEDPA's general purpose of "'further[ing] the principles of comity, finality, and federalism.'" *Duncan v. Walker*, 121 S. Ct. 2120, 2127 (2001) (quoting *Williams v. Taylor*, 529 U.S. 362, 436 (2000)). Specifically, it "promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued." *Id.* at 2128. It does so while also "limit[ing] the harm to the interest in finality by according tolling effect only to 'properly filed application[s] for State post-conviction or other collateral review.'" *Id.*

Every court of appeals to have considered the question has concluded that a state application for collateral review remains "pending" under section 2244(d)(2), and thus tolls the statute of limitations, from the time it is filed until the final disposition of any timely appeal relating to the application. *See Hizbullahankhamon v. Walker*, 255 F.3d 65, 72 (2d Cir. 2001); *Swartz v. Meyers*, 204 F.3d 417, 421-22 (3d Cir. 2000); *Taylor v. Lee*, 186 F.3d 557, 560-61 (4th Cir. 1999), *cert. denied*, 528 U.S. 1197 (2000); *Melancon v. Kaylo*, 259 F.3d 401, 406 (5th Cir. 2001); *Payton v. Brigano*, 256 F.3d 405, 408 (6th Cir. 2001), *petition for cert. filed*, No. 01-6749 (U.S. Oct. 5, 2001); *Fernandez v. Sternes*, 227 F.3d 977, 979-80 (7th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 883-84 (8th Cir. 1999); *Nino v. Galaza*, 183 F.3d 1003, 1005 (9th Cir. 1999); *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999); *Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000).[5] The Warden, however, now asks this Court to reject

[5] Neither *Tinker v. Moore*, 255 F.3d 1331 (11th Cir. 2001), nor *Painter v. Iowa*, 247 F.3d 1255 (8th Cir. 2001), cited by the Warden at Br. 16, is to the contrary. Unlike the instant case and the court of appeals cases cited in text, in those cases the one-year limitations period had already expired by the time the prisoners first filed their state petitions for collateral review. *See* 255 F.3d at 1334-35; 247 F.3d at 1256.

this approach and to announce a rule permitting tolling only while a state application for collateral review is actually before a court awaiting decision. Under the Warden's reading, the one-year limitations period could potentially expire before a prisoner has been able to exhaust his state remedies, even though the prisoner has pursued those remedies within the time provided by state law—or, as discussed below, even where the "delay" is occasioned by the Warden himself taking the time allocated by state law to file an appeal from a decision in the prisoner's favor. The Warden's reading is not only contrary to the unanimous position of the courts of appeals, it is also at odds with both the statutory text and its clear purpose of promoting the exhaustion of state remedies prior to federal review.

A. The Text of Section 2244(d)(2) Strongly Supports the Unanimous View of the Courts of Appeals That a State Application for Collateral Review Is Pending Until the Final Disposition of Any Timely Appeal.

Section 2244(d)(2) tolls the limitations period for "[t]he time during which a properly filed application for State . . . collateral review . . . is pending." Because Congress did not specifically define any of the terms in this section, they should be "construe[d] in accord with [their] ordinary or natural reading." *Smith v. United States*, 508 U.S. 223, 228 (1993); *see Williams v. Taylor*, 529 U.S. at 431. For present purposes, the analysis focuses principally on the word "pending," which the pertinent edition of Black's Law Dictionary[6] defines as "[b]egun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled, undetermined . . . . Awaiting an occurrence or conclusion of action,

[6] AEDPA was enacted in 1996. Accordingly, the Warden's reliance on the Seventh Edition of Black's Law Dictionary, published in 1999, is inappropriate. *See Molzof v. United States*, 502 U.S. 301, 307 (1992) (consulting "legal dictionaries in existence when the [statute] was drafted and enacted").

period of continuance or indeterminacy. . . ." *Black's Law Dictionary* 1134 (6th ed. 1990).[7] This definition, which "reflects the term's common usage," *Swartz*, 204 F.3d at 421, conveys the idea that an action's pendency encompasses the entire time until its final resolution, not just certain subsegments of that time during which the action is being reviewed by a particular court. Thus, the plain meaning of "pending" supports the conclusion that a "suit is pending until [any] appeal is disposed of." *Mackenzie v. A. Engelhard & Sons Co.*, 266 U.S. 131, 142-43 (1924); *see de Rodulfa v. United States*, 461 F.2d 1240, 1253 (D.C. Cir.) (same), *cert. denied*, 409 U.S. 949 (1972).[8]

This understanding is also consistent with the way in which "pending" has been construed in other contexts. A provision of the Clayton Act, for example, provides that the statute of limitations for private actions arising under the federal antitrust laws "shall be suspended during the pendency" of enforcement actions brought by the United States with respect to the same matter, and for one year thereafter. 15 U.S.C. § 16(i). Courts construing "pendency" in that context have consistently held that actions remain pending from the

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7 The Warden's attempt (Br. 24-25) to confine this general definition only to cases pending on direct review is unavailing. Although the finality of a criminal conviction is contingent on the completion of direct, rather than collateral, review, that fact in no way limits the circumstances in which a petition for post-conviction relief (as opposed to the conviction itself) is pending. Moreover, the definition of "pending" cited here contains no special limits or qualifications suggesting that it applies only in certain contexts. Rather, the definition applies fully to an action for post-conviction relief just as it does to the prior litigation that produced the underlying conviction.

8 Other definitions similarly reflect the view that "pending" refers to all the time until an action becomes definitively final and can no longer be continued. *See Webster's Third New International Dictionary* 1669 (1993) ("not yet decided: *in continuance*: in suspense") (emphasis added); *The Random House Dictionary of the English Language* 1065 (1966) ("remaining undecided; awaiting decision or settlement; *unfinished*") (emphasis added).

time they are first filed until the completion of all appeals (or, if no appeal is filed, until the expiration of the time to appeal). *See Monarch Asphalt Sales Co., Inc. v. Wilshire Oil Co. of Texas*, 511 F.2d 1073, 1078 (10th Cir. 1975); *Russ Togs, Inc. v. Grinnell Corp.*, 426 F.2d 850, 857 (2d Cir.), *cert. denied*, 400 U.S. 878 (1970); *Baldwin v. Loew's Inc.*, 312 F.2d 387, 391 (7th Cir. 1963); *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846, 857-58 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952). Similarly, a provision in the Balanced Budget Act of 1997 making certain amendments to the Social Security Act applicable to "pending" lawsuits has been construed to include "not only undecided cases at the District Court level," but also "every still-live dispute" that has not yet "completed its journey through the appellate process." *Beverly Cmty. Hosp. Ass'n v. Belshe*, 132 F.3d 1259, 1264-65 (9th Cir. 1997), *cert. denied*, 525 U.S. 928 (1998).[9] Moreover, in *Huffman v. Pursue*, 420 U.S. 592, 607-09 (1975), this Court held that *Younger* abstention, which directs federal courts generally not to hear cases that could interfere with certain "pending state court proceedings," 401 U.S. 37, 41 (1971), applies where a federal action is filed after the relevant state trial court has issued its judgment, but while there is still time under state law to file an appeal.

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9 The Warden's attempt (Br. 23-24) to distinguish *Beverly* and similar cases is unpersuasive. It is true, as the Warden observes, that *Beverly* implicated the well-established rule that Congress may, consistent with the Constitution, provide that changes in substantive law apply to cases pending on appeal. *See Hamling v. United States*, 418 U.S. 87, 101-02 (1974) (reciting the general rule). But the constitutional issue arose in *Beverly* only after the court concluded as a matter of statutory construction that Congress's reference to "pending" cases in the Balanced Budget Act of 1997 included not only cases awaiting decision at the district court level but also cases on appeal. *See* 132 F.3d at 1264. It is the substance of that statutory construction, not the constitutional question it raised, that is relevant here.

Every court of appeals to have construed this aspect of section 2244(d)(2) has done so in a manner consistent with the plain meaning of "pending" and with courts' consistent treatment of the term in other areas of the law. Those courts have unanimously concluded that the "sensible" reading is that a state petition "continues to be 'pending' during the period between one court's decision and a timely request for further review by a higher court." *Fernandez*, 227 F.3d at 980; *see Melancon*, 259 F.3d at 406 (collecting cases).[10] This Court should adopt that reading as well.

Congress's inclusion of certain other terms in section 2244(d)(2) confirms that the section is best read as tolling the statute of limitations continuously from the filing of a state application for collateral review until the final disposition of any timely appeals relating to the application. The statute refers to "[t]he *time* during which a properly filed *application* . . . is pending." 28 U.S.C. § 2244(d)(2) (emphasis added). It is significant that the statute uses the singular nouns "time" and "application"—rather than plural nouns such as "times" or "days" on one hand, or "application and appeals" or simply "applications," on the other. As a general matter, "time" can be "expressive both of a precise *point* or *terminus* and of an *interval* between two points." *Black's Law Dictionary* 1483 (6th ed. 1990); *see id.* ("A point in or space or duration at or during which some fact is alleged to have been committed."). Obviously, "an interval between two points," not a single point, is intended here. Such an interval plainly is a single continuous period (from the filing of the habeas petition through the resolution of all appeals), not a set of discontinuous periods (while matters are before different courts). *See Webster's Third New International Dictionary* 2394 (1993) (defining "time" as "a period during which something (as an action, process, or condition) exists or continues: an interval comprising a limited and continuous action, condition, or state of being . . . ."). Moreover, the statute's reference to a singular "application" reinforces the sense that it is a *single* thing (full litigation of an "application")—not several distinct things (distinct trial court, appellate court, and state supreme court proceedings on "applications")—that tolls the one-year limitations period. Thus, a single "application" remains "pending" during the continuous "time" from its filing to its final disposition on appeal.[11]

Warden Newland attempts (Br. 27-28) to bolster his narrow construction of the tolling provision by pointing to the different language that Congress used in 28 U.S.C. § 2263(b)(2), the parallel tolling provision applicable in capital cases in so-called "opt-in" states that have met certain conditions regarding the appointment of post-conviction counsel. Section 2263(b)(2) provides that the limitations period in such cases is tolled "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition." *Id.* The Warden contrasts this language to the text of section 2244(d)(2) and draws the negative inference that Congress did not intend tolling under section 2244(d)(2) to extend as

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10 There is some disagreement among the courts of appeals over whether a petition also continues to be pending during the time allowed for appeal under state law if no appeal is ultimately filed. *Compare, e.g.*, *Swartz*, 204 F.3d at 424 (finding that tolling applies in that circumstance), *with Fernandez*, 227 F.3d at 980 (suggesting that tolling is not available in such cases). That question is not implicated here: all of the time to be tolled in this case corresponds to Respondent Saffold's active use of the California appellate courts.

11 *Amici* the State of North Carolina *et al.* simply ignore the language of the statute in the course of arguing (Br. 8) that "no 'application' is pending between the date the application is denied [by the trial court] and the date appellate review is sought." If, as *amici* suggest, Congress viewed an appeal as a separate "application (*i.e.*, a document requesting relief)," *id.* at 8, then one would have expected Congress to use the plural form of the word ("applications") to refer to the habeas petition and subsequent appeals, rather than the singular. But Congress did not choose that form of the word, and the flaw in *amici*'s argument on this point is dramatized by their own misquoting of the statute as referring to "'pending' '*applications*.'" *Id.* at 9 (emphasis added).

broadly as under section 2263(b)(2). That argument is unpersuasive, for several reasons.

First, as this Court has observed, AEDPA's various provisions are hardly a model of textual consistency. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997) ("[I]n a world of silk purses and pigs' ears, [AEDPA] is not a silk purse of the art of statutory drafting."). Accordingly, the mere presence of differing verbal formulations in parallel provisions of the statute does not necessarily compel the conclusion that the provisions have different meanings.[12]

Second, this is not a case in which the kind of negative inference sought by the Warden is most appropriate. "[N]egative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Id.* at 330; *see Field v. Mans*, 516 U.S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference . . . ."). Here, in contrast, there is no evidence in the legislative record that the texts of sections 2244(d)(2) and 2263(b)(2) ever started out the same, or that there is anything deliberate in the textual difference between the two sections. To the contrary, AEDPA placed the two tolling provisions in two entirely separate chapters of Title 28 (chapter 153 for section 2244(d)(2); chapter 154 for section 2263(b)(2)), and those two chapters "beg[a]n life independently and in different Houses of Congress." *Lindh*, 521 U.S. at 330.

Third, the Warden cannot point to any plausible legislative purpose that might be served by construing section

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12 For example, section 2263(b)(2) refers to a "petition" for collateral review, while section 2244(d)(2) uses the term "application." Similarly, section 2244(d)(2) states that certain time "shall not be counted," while section 2263(b) states that certain time requirements "shall be tolled." There is no indication, or reason to believe, that Congress meant these terms to have different meanings.

2263(b)(2) more broadly than section 2244(d)(2). As a general matter, section 154 of Title 28 (of which section 2263(b)(2) is part) establishes "special rules *favorable to the state party*" in capital cases, in return for the state's agreement to provide for the appointment of post-conviction counsel in such cases. *Id.* at 327 (emphasis added); *see* 28 U.S.C. § 2261(a)-(c) (setting the conditions of chapter 154's applicability); H.R. Rep. No. 104-23, at 10 (1995) (describing chapter 154's "quid pro quo arrangement"). To construe section 2263(b)(2) as more favorable *to the prisoner* than section 2244(d)(2) would thus turn chapter 154's purpose on its head: Rather than providing states with an incentive to provide counsel in state post-conviction proceedings, section 2263(b)(2) would put states in a worse position with respect to the statute of limitations (by providing for a broader tolling period) than under the general tolling provision contained in section 2244(d)(2).

Finally, it bears noting that, as just described, section 2263(b)(2) is necessarily triggered only in cases where the state prisoner is guaranteed representation in state post-conviction proceedings. *See* 28 U.S.C. § 2261(a)-(c). But because there is no general federal right to counsel in habeas proceedings, a great many cases subject to section 2244(d)(2) may involve *pro se* prisoners. If section 2263(b)(2) were understood to establish a more generous tolling rule than section 2244(d)(2), the statute would have the anomalous effect of requiring *pro se* prisoners to understand and comply with a more strict tolling rule than the one applicable to prisoners represented by counsel. Such a result would be contrary to this Court's "admonition" that habeas procedures should not be used to "trap the unwary *pro se* prisoner," *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (internal quotation marks omitted), and should therefore be avoided.

Ultimately, there is no reason to read section 2244(d)(2) in a manner inconsistent with its most natural and most "sensible" meaning. Section 2244(d)(2) and section 2263(b)(2) mean the same thing, the first by using a term—"pending"—

and the second by using the standard definition of that term. It makes no sense to propose that by employing both a standard term and its conventional definition, AEDPA somehow changed the former.[13] As every court of appeals to have addressed the issue has concluded, the plain text of section 2244(d)(2) is best read as tolling all of the time between the filing of a state application for collateral review and the final disposition of any timely appeal relating to that application.

B. Consideration of the Purposes of AEDPA and Section 2244(d)(2) Reinforces the Plain Meaning of the Text.

Consideration of AEDPA's purposes confirms that section 2244(d)(2) is properly construed as tolling the statute of limitations for the entire period between the filing of an application for state collateral review and the final disposition of any timely appeals. In general, AEDPA aims to "'further the principles of comity, finality, and federalism.'" *Duncan*, 121 S. Ct. at 2127 (quoting *Williams*, 529 U.S. at 436). The Warden's narrow construction of section 2244(d)(2) disserves those purposes, while the construction advocated here and adopted unanimously by the courts of appeals reinforces them.

AEDPA's interests in comity and federalism are principally served by the requirement contained in 28 U.S.C.

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[13] The Warden is also unpersuasive in his attempt (Br. 28-29) to make the same point by contrasting section 2244(d)(2) with 28 U.S.C. § 2244(d)(1)(A), which establishes the point at which the limitations period generally begins to run. *See* 28 U.S.C. § 2244(d)(1)(A) ("The limitation period shall run from the latest of—(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . . ."). Unlike section 2244(d)(2), which uses the term "pending" in its ordinary sense to refer to the ongoing status of a case, section 2244(d)(1)(A) identifies a discrete point in time: "the date on which the judgment became final." Thus, the two provisions have fundamentally different purposes, and there is no reason to infer that the text of section 2244(d)(1)(A) in any way alters the common meaning of "pending" as used in section 2244(d)(2).

§ 2254(b) that state prisoners exhaust their state remedies before pursuing federal habeas remedies. *See Duncan*, 121 S. Ct. at 2127-28 (explaining that the exhaustion requirement "ensures that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment"); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) ("[T]he exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts"); *Picard v. Connor*, 404 U.S. 270, 275 (1971) (the exhaustion requirement "reflects a policy of federal state comity"). The interest in finality, in turn, is served by section 2244(d)(1)'s one-year statute of limitations. *See Duncan*, 121 S. Ct. at 2128 (the limitations provision "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review"). Properly construed, section 2244(d)(2) "balances the interests served by the exhaustion requirement and the limitation period." *Id.* Specifically, it "limits the harm to the interest in finality by according tolling effect only to 'properly filed application[s] for . . . collateral review,'" while at the same time promoting exhaustion by "protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued." *Id.*

The pursuit of these aims—encouraging exhaustion of state remedies and preserving the finality of state court judgments—reflects AEDPA's focus on "address[ing] a number of problems . . . in *federal* court criminal litigation," especially "the lengthy delays in filing that now often occur in *federal* habeas corpus litigation." H.R. Rep. No. 104-23, 9 (1995) (emphasis added). That is, AEDPA's statute of limitations and tolling provision are, like AEDPA's other habeas reforms, aimed at streamlining the *federal* habeas procedures by encouraging prisoners first to make full use of available state procedures and then spurring them "to seek federal ha-

beas review in a timely manner." *Id.* But nothing in the purposes animating AEDPA reveals any congressional purpose to truncate the pursuit of *state* post-conviction relief prior to seeking federal habeas review. To the contrary, AEDPA aims to encourage the exhaustive pursuit of state remedies so that the federal intrusion into state criminal cases may be minimized.

In *Duncan*, this Court declined to adopt a reading of section 2244(d)(2) that it concluded would disserve AEDPA's purpose to promote the exhaustion of state remedies. Specifically, the Court rejected an argument that the provision tolls the statute of limitations during the pendency of *federal* habeas petitions, in part because such a construction "would furnish little incentive for individuals to seek relief from the state courts before filing federal habeas petitions." *Id.* Conceding that "other statutory provisions, such as § 2254(b) itself . . . would still provide individuals with good reason to exhaust" their state remedies no matter how section 2244(d)(2) was interpreted, *Duncan* nevertheless refused to construe section 2244(d)(2) in a manner that would at all diminish the "statutory incentives to proceed first in state court." *Id.* Any diminution in those incentives, the Court reasoned, would "increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." *Id.* Finally, and crucially for present purposes, the Court held that even if tolling the statute of limitations during the pendency of federal habeas petitions "would further Congress' goal to spur defendants to file their federal habeas petitions more quickly," such tolling was unacceptable because it "fail[ed] to account sufficiently for AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review." *Id.* at 2129.

Here, the Warden's construction of section 2244(d)(2) should be rejected for the same reasons. In order to meet the exhaustion requirement, prisoners generally must "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845. Interpreting the statute to permit tolling only while a state petition is actually before a court awaiting decision would compromise the interest in exhaustion in at least two ways. First, it would force prisoners to file state appeals prematurely, without taking sufficient time to articulate their claims fully and in a manner susceptible to "full and fair" review by the state courts. *Id.* For example, although "a transcript [of the trial court habeas proceedings] is often a necessary part of the trial court record filed for appellate review," the state is generally responsible for the preparation of that transcript and "the time required . . . to prepare and deliver the transcript is a matter completely out of a prisoner's control." *Taylor*, 186 F.3d at 561. Under the Warden's construction of section 2244(d)(2), however, a state prisoner may be forced to choose between waiting to receive the trial transcript while the federal statute of limitations continues to run, and filing an appeal in the state court without the benefit of the transcript. Neither course is faithful to the exhaustion doctrine: the former would effectively impose a federal penalty on state prisoners who use the time allocated under state law to prepare comprehensive state appeal papers; the latter would diminish state courts' ability to engage in meaningful collateral review, thus raising the "unseem[ly]" specter of "a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance." *O'Sullivan*, 526 U.S. at 845.

Second, the Warden's construction of section 2244(d)(2) would generate piecemeal litigation by encouraging prisoners to file "protective" petitions in federal court prior to the completion of state collateral review, to ensure that their federal petitions are filed within the statute of limitations. *See Melancon*, 259 F.3d at 406 ("If the time [after] a disposition but before a timely filed appeal is not tolled, a habeas petitioner is likely to file a protective federal petition before he has fully exercised all state appeals if there is a possibility that

the right to federal habeas might be extinguished."); *Nino*, 183 F.3d at 1005 (a narrower construction of section 2244(d)(2) "would inevitably lead to the filing of protective federal petitions"). To be sure, nothing in AEDPA prohibits a federal district court from "retain[ing] jurisdiction over a meritorious claim and stay[ing] further proceedings pending the complete exhaustion of state remedies. Indeed, there is every reason to do so . . . when the failure to retain jurisdiction would foreclose federal review of a meritorious claim because of the lapse of AEDPA's 1-year limitations period." *Duncan*, 121 S. Ct. at 2130 (Stevens, J., concurring in part and concurring in the judgment); *see Neverson v. Bissonnette*, 261 F.3d 120, 126 n.3 (1st Cir. 2001) (identifying circumstances where a stay is appropriate); *Zarvela v. Artuz*, 254 F.3d 374, 380-82 (2d Cir.) (same), *cert. denied*, 122 S. Ct. 506 (2001); *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000). But the fact that such a procedure is *permissible* under AEDPA does not mean that section 2244(d)(2) should be construed to *encourage* it. Rather, section 2244(d)(2) should be construed to avoid any "diminution of statutory incentives to proceed first in state court" and to minimize the "risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." *Duncan*, 121 S. Ct. at 2128.[14]

The incompatibility of the Warden's argument with the purposes of the statute—and the anomalous consequences his reading would generate—is particularly acute in cases in which a prisoner *wins* his state habeas case in a lower state court. Under the Warden's construction of section

[14] As Justice Powell explained in testimony before Congress, the exhaustion requirement "represents appropriate respect for federalism—a state court system should have an opportunity to address any errors on its own before intrusion by the federal system." *Habeas Corpus Legislation: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 79 (1990) (testimony of Justice Lewis F. Powell, Jr.). Justice Powell thus recommended against adopting any rule that would "weaken the exhaustion requirement" by "promot[ing] piecemeal litigation." *Id.*

2244(d)(2), if a higher state court were eventually to reverse the grant of habeas relief, the time taken *by the state* to prepare its timely appeal would not toll the federal statute of limitations. There would be nothing the prisoner could do in state court to stop the running of the statute during that time, because there would be no appeal for him to file. The state, on the other hand, could substantially decrease, or even eliminate, the prisoner's federal limitations period simply by using all of the time allowed under state law for filing its appeal.[15] As a consequence, to protect his federal rights, a cautious and informed *pro se* prisoner who *won* his case in state court could be compelled nevertheless to attempt to file a federal habeas petition while the state appellate process went forward. If such a federal petition were rejected as unripe or if a prisoner did not file in federal court while the state appealed his lower court victory, the prisoner might simply lose his federal rights in a case facially meritorious enough to persuade at least one state court to rule in his favor. Section 2244(d)(2) surely does not require such a result. *Cf. Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998) (avoiding a construction of AEDPA that would have "far reaching and seemingly perverse" implications).

Thus, the Warden's construction of section 2244(d)(2) in this case disserves the exhaustion doctrine by compromising the integrity of the state appeal process, by encouraging pre-

[15] On this point, the Warden has apparently abandoned the position taken by California's Attorney General when AEDPA was under consideration in the Congress. *See Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process, Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 146 (1995) ("[W]e all agree that the petitioner should not be punished [by having the statute of limitations continue to run] for delay beyond his or her control.") (statement of California Attorney General Daniel E. Lungren). *Amicus* the Criminal Justice Legal Foundation also evidently disagrees with the Warden on this point. *See* Br. 10 ("Congressional intent [in enacting the limitations provision] does not include punishing petitioners for delays *beyond their control*.") (emphasis in original).

mature filings in federal court, and by causing uncertainty and unfairness when the state is the appellant in its own courts. In contrast, interpreting section 2244(d)(2) to toll the statute of limitations throughout the state collateral review process is entirely consistent with the exhaustion requirement. It "promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued," *Duncan*, 121 S. Ct. at 2128, and it minimizes the chance of premature federal court filings by assigning no adverse consequences to a prisoner's—or the state's—full and timely use of the state appellate process. This reading thus best comports with "the goals of comity and federalism that the exhaustion requirement serves." *Id.* at 2129; *see Rose v. Lundy*, 455 U.S. 509, 518 (1982) (the exhaustion requirement is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings").

The Warden nevertheless insists (Br. 39) that his narrower construction of section 2244(d)(2) serves AEDPA's purpose of "requiring state prisoners to pursue state collateral review without unnecessary delay." This argument is misconceived. It is true, as noted above, that AEDPA—and in particular section 2244(d)(1)'s one-year limitations period—serves "the well-recognized interest in the finality of state court judgments" by "restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan*, 121 S. Ct. at 2128. It is crucial to recognize, however, that the interest in finality is the *state's*, not the federal government's. *See Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998); *Lonchar v. Thomas*, 517 U.S. 314, 322 (1996) (noting the "State's interest in the 'finality' of its own legal processes.") (quoting *Withrow v. Williams*, 507 U.S. 680, 698 (1993) (O'Connor, J., concurring in part and dissenting in part)); *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993). Thus, if the Warden's insistence on the need to avoid unnecessary delay has any purchase in this context, it must refer to the state's interest in avoiding "delay on the road to finality." *Duncan*, 121 S. Ct. at 2128.

Viewed in this light, however, the Warden's position simply makes no sense. The essence of his argument is that "allow[ing] additional tolling based upon time periods permitted under state law [for appealing state court decisions] would open the door for state procedural laws and rules to in effect trump the federal statute of limitations." Br. 31. But because it is *the state's laws* that provide the time to appeal within the state system, no cognizable state interest is violated by tolling the federal statute during that time. The Warden's insistence to the contrary appears premised either on the notion that there is a *federal* interest in the finality of state court judgments that somehow trumps the interest of the states with respect to those judgments, or on the idea that a state's laws allocating time to appeal within its court system are somehow antithetical to the state's own interests. Both of those premises are unsound, at radical variance with the principles of comity that underlie the statute, and without any foundation in this Court's federal habeas jurisprudence. *Cf. Coleman v. Thompson*, 501 U.S. 722, 726 (1991) (emphasizing "the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus").[16]

The Warden's assertion (Br. 48) of the need for a "uniform national rule" regarding tolling under section

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[16] The approach of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases ("Powell Committee"), chaired by Justice Powell, is instructive in this regard. The Powell Committee's proposals for federal habeas reform, upon which many of AEDPA's provisions were based, never once suggested that there is a federal interest in the finality of state criminal cases that is separate from—much less superior to—the interests of the relevant state. Rather, the Powell Committee spoke only of the "state interest in the finality of criminal convictions and capital sentences." Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Committee Report and Proposal ("Powell Committee Report") 11 (Aug. 23, 1989).

2244(d)(2) is similarly unavailing. Determining what it means for an application to be "pending" under the statute is a matter of federal law, *see*, *e.g.*, *Mills*, 187 F.3d at 883 (definition of "pending" is "an issue of federal law"), and in that sense any determination made by this Court on this issue will certainly establish a uniform national rule. The Warden, however, appears to suggest that section 2244(d)(2) must be construed so that the actual length of tolling is somehow "uniform" from case to case, and in no way affected by differences in state law. But the Warden fails to identify any textual or other evidence that section 2244(d)(2) is meant to operate that way. Indeed, the Warden's argument on this point is at odds with AEDPA's purpose of "further[ing] the principles of comity, finality, and federalism," *Duncan*, 121 S. Ct. at 2127 (internal quotation marks omitted), which require respecting the particularized interests and policy judgments of individual states. Rather than creating a uniform tolling period for all cases, section 2244(d)(2) is best interpreted as respecting these principles by dictating explicitly that the limitations period is tolled for the "time during which a properly filed application . . . is pending," but by refraining from interfering with individual states' respective judgments about how long an application may remain pending during the interval between one state court's decision and the filing of an appeal at the next level.[17] That indeed is the "uniform

[17] The Warden's reading of the statute would not achieve national uniformity in tolling periods in any event. Substantial empirical evidence confirms that the amount of time state applications for collateral review sit before state courts awaiting decision (time that the Warden concedes is tolled under section 2244(d)(2)) varies widely both from state to state and from case to case within individual states. *See* Fred Cheesman *et al.*, *Caseload and Timeliness in State Supreme Courts*, 7 Caseload Highlights (Dec. 2001) (reporting significant variations in case processing time for discretionary writs in five representative states, both from state to state and between granted writs and denied writs within individual states). This wide variation ensures that section 2244(d)(2), even construed as the Warden would have it, cannot possibly achieve the national uniformity he seeks.

national rule" already applied by all federal courts of appeals to have addressed the issue.

II. THE STATUTE OF LIMITATIONS SHOULD BE TOLLED FROM THE TIME A CALIFORNIA PRISONER FILES A HABEAS PETITION IN STATE SUPERIOR COURT UNTIL FINAL DISPOSITION OF A TIMELY PETITION TO THE CALIFORNIA SUPREME COURT.

In California, state prisoners typically pursue post-conviction relief by filing an original petition for a writ of habeas corpus in the state superior court, and, if the petition is denied, by seeking appellate review through the filing of new original petitions in the court of appeal and state supreme court. This system of successive original writs is the functional equivalent of an appellate system. Accordingly, the time that a California prisoner spends seeking timely appellate review of his petition for post-conviction relief is time that his post-conviction proceedings are "pending" within the meaning of section 2244(d)(2), just as applications for post-conviction relief in other states are "pending" until the final disposition of any timely appeals relating to those applications.

A. California's System of Original Writs Functions Like an Appellate System.

Historically, the default rule in American courts was that an order denying habeas relief was not directly appealable. Instead, a petitioner could obtain appellate consideration of his claims by filing a new petition in a higher court. *See* Br. of *Amicus* Criminal Justice Legal Foundation 11 (citing W. Church, *Habeas Corpus* §§ 386, 389 (2d ed. 1893)). Such successive petitions functioned as appeals. Indeed, this Court historically treated original petitions for habeas corpus as requests that the Court exercise its "appellate power" to review the decisions of lower courts. *Ex parte Siebold*, 100 U.S. 371, 374 (1879); *see, e.g.*, *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 97-100 (1868); *Ex parte McCardle*, 73 U.S. (6 Wall.)

318, 324 (1867); *Ex parte Bollman*, 8 U.S. (4 Cranch.) 75, 100-01 (1807); *see also* James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 2.2, at 8-9 & n.5 (3d ed. 1998) (collecting cases). Since the nineteenth century, the overwhelming majority of states have enacted statutes permitting prisoners to file direct appeals of the denial of their state habeas petitions.[18]

California has chosen largely to retain its traditional system of original writs. Like the federal system of an earlier day, however, an integral part of that system is the practice whereby a non-capital petitioner, such as Mr. Saffold, files for post-conviction relief initially in the superior court and proceeds up the judicial ladder by original writ seeking appellate review of lower court decisions denying relief.

The California Constitution, which guarantees the writ of habeas corpus, Cal. Const. art. I, § 11, also provides that the California Supreme Court, the courts of appeal, and the various superior courts all have original jurisdiction in habeas corpus proceedings, *id.* art. VI, § 10. It is well established, however, that habeas petitions seeking post-conviction review are most appropriately filed in the superior court in the first instance, and a prisoner who does not comply with this preference risks dismissal of his petition. *See In re Ramirez*, 108 Cal. Rptr. 2d 229, 232 (Cal. Ct. App. 2001) ("[T]his court has discretion to refuse to issue the writ as an exercise

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18 *See, e.g.*, Ala. Code § 12-22-90 (1975); Ariz. R. Crim. P. 32.9(g); Conn. Gen. Stat. § 52-470(b); Fla. Stat. Ann. § 924.059(5); 725 Ill. Comp. Stat. Ann. 5/122-7 (Smith-Hurd); Me. Rev. Stat. Ann. tit. 15, § 2131; Mass. R. Crim. P. 30(g); Minn. Stat. Ann. § 589.29; Miss. Code Ann. § 11-43-53; Nev. Rev. Stat. 34.575; N.J. Stat. Ann. § 2A:67-36; N.Y. C.P.L.R. 7011; 42 Pa. Cons. Stat. Ann. §§ 9541-9546; Tenn. Code Ann. § 29-21-127; Va. Sup. Ct. R. 5:17. *But see, e.g., Triplett v. Deputy Warden*, 371 N.W.2d 862, 866 (Mich. App. 1985) (superior court denial of habeas petition may not be appealed, but prisoner may file an original petition in court of appeal); *Charest v. Howard*, 285 A.2d 381, 386 n.7 (R.I. 1972) (superior court denial of habeas petition may not be appealed, but prisoner may file an original petition in supreme court).

of original jurisdiction on the ground that application has not been made therefor in a lower court in the first instance.") (citing *In re Hillery*, 20 Cal. Rptr. 759, 760 (Cal. Ct. App. 1962)); *Harris v. Superior Court*, 500 F.2d 1124, 1126 (9th Cir. 1974) ("California appellate courts may refuse to entertain habeas corpus petitions where no previous application for such relief has been made in the Superior Court."), *cert. denied*, 420 U.S. 973 (1975). Indeed, "[i]t is a general policy of reviewing courts not to issue an extraordinary writ unless an application for the writ or other appropriate relief has first been made in a lower court, or some unusual circumstances make it proper to apply to the reviewing court in the first instance." *See* B. Witkin & N. Epstein, 6 *California Criminal Law: Criminal Writs* § 20, at 540 (3d ed. 2000).[19]

Because neither the courts of appeal nor the California Supreme Court is equipped to conduct evidentiary hearings, it makes practical sense that habeas petitions, particularly those requiring the development of additional facts, first be filed in superior court. *See People v. Baker*, 253 Cal. Rptr. 615, 618 n.2 (Cal. Ct. App. 1988). Thus, even if an appellate court does not exercise its discretion to dismiss a state habeas petition filed for the first time in that court, it will often redirect the case to superior court for factual development by issuing an order to show cause returnable to the superior court. *See* Cal. Penal Code § 1508(a)-(b); Cal. R. Ct. 56(a)(1); *In re Hochberg*, 471 P.2d 1, 4 n.2 (Cal. 1970), *rejected on other grounds*, *In re Fields*, 800 P.2d 862 (Cal. 1990); *In re Elias*, 25 Cal. Rptr. 739, 740 (Cal. Ct. App. 1962); *In re Hillery*, 20 Cal. Rptr. at 760.[20] This procedure "effectively transfers the

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19 This preference for filing first in the lower court has been incorporated into a court rule providing that "[i]f the petition might lawfully have been made to a lower court in the first instance, [the petition] shall set forth the circumstances that, in the opinion of the petitioner, render it proper that the writ should issue originally from the reviewing court." Cal. R. Ct. 56(a)(1).

20 The appellate courts also have a procedure whereby a referee is appointed to find facts and report to the reviewing court in writing. *See In*

proceeding to the superior court." *People v. Romero*, 883 P.2d 388, 393 (Cal. 1995). The superior court has the exclusive power to decide the case, just as if the case had been filed in the superior court in the first instance. *Id.*

If a prisoner is granted relief in the superior court, the state may seek appellate review by straightforward appeal to the court of appeal, even if the superior court order is on the return of a writ of habeas corpus from the court of appeal or the supreme court. *See* Cal. Penal Code § 1506; *In re Crow*, 483 P.2d 1206, 1212 (Cal. 1971). As with any direct appeal, the party that loses in the court of appeal may seek additional review by filing a petition for review in the California Supreme Court. *See* Cal. Penal Code § 1506; *see also, e.g., In re Earley*, 534 P.2d 721, 723 (Cal. 1975); *In re Walker*, 518 P.2d 1129, 1132 (Cal. 1974).

A prisoner has no equivalent right of direct appeal from the superior court's denial of all or part of his habeas petition. *See People v. Garrett*, 79 Cal. Rptr. 2d 803, 805 (Cal. Ct. App. 1998). Instead, a petitioner may seek the court of appeal's review by filing a new habeas petition with that court, which has original jurisdiction in habeas corpus matters. *See* Cal. Const. art. VI, § 10; *In re Reed*, 663 P.2d 216, 217 n.2 (Cal. 1983). When a prisoner, instead of filing a new writ, purports to "appeal" from the superior court's denial, a reviewing court may in its discretion choose to treat the filing as a new petition and review it on the merits. *See People v. Gallardo*, 92 Cal. Rptr. 2d 161, 164 (Cal. Ct. App. 2000).

If the court of appeal denies the relief sought in a renewed petition for habeas corpus, the prisoner may seek the

re Weber, 523 P.2d 229, 231 (Cal. 1974); *In re Hochberg*, 471 P.2d at 4 n.2. The California Supreme Court often uses a referee to develop the factual record in death penalty cases. *See, e.g., In re Gay*, 968 P.2d 476, 480 (Cal. 1998), *In re Johnson*, 957 P.2d 299, 300-01 (Cal. 1998); *In re Visciotti*, 926 P.2d 987, 989 (Cal. 1996), *cert. denied*, 521 U.S. 1124 (1997). The procedure is less frequently used in non-capital cases. *See* J. Bradley O'Connell, *The Uncharted World of Non-Capital State Habeas Corpus Practice*, Cal. Crim. Def. Prac. Rep. 637, 645 (Oct. 1998).

California Supreme Court's review by filing either a petition for review, *see* Cal. Penal Code § 1506, or another original petition, *see In re Clark*, 855 P.2d 729, 740 n.7 (Cal. 1993); *In re Catalano*, 623 P.2d 228, 232 (Cal. 1981). Where, as here, the court of appeal denies the petition by summary order, its denial generally becomes final immediately and the prisoner must file a petition for review within ten days of the date of the order. *See* Cal. R. Ct. 24(a), 28(b). Original petitions are not subject to that deadline, but instead must be filed "within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis for the claim." *In re Harris*, 855 P.2d at 398 n.7.[21]

Appellate review on original writ resembles more conventional appellate review in a number of respects. The standard of review is identical to the standard used in cases where the court reviews the case following the report of a referee who submitted his findings to the court. *See In re Fountain*, 74 Cal. App. 3d 715, 717-18 (Cal. Ct. App. 1977). Legal questions and mixed questions of law and fact are subject to "independent review." *In re Hitchings*, 860 P.2d 466, 471-72 (Cal. 1993). And while the superior court's factual

21 Although a petitioner may file either a petition for review or an original petition in the California Supreme Court, an original petition is often a more appropriate vehicle, particularly from a summary denial unaccompanied by written opinion. The Warden's assertion (Br. 25) that a petition for review is "strongly preferred" relies upon a misconstruction of *In re Michael E.*, 538 P.2d 231 (1975), which was itself cited by the Ninth Circuit in *Nino*. In *In re Michael E.*, the California Supreme Court granted the prisoner's petition for a writ of habeas corpus. *Id.* at 237. In so doing, the court also explained that, in cases where the court of appeal issued a published opinion (as it did in that case), the California Supreme prefers to consider the matter on petition for review. *Id.* at 237 n.15. Such considerations do not apply here, because the court of appeal summarily denied the petition without opinion. *See* J.A. 30. And in any event, the Warden cites no case even suggesting that a court's "preference" in this regard has any bearing on the availability of merits review on a habeas petition filed in the California Supreme Court.

findings are not binding on the reviewing court, the court gives great weight to findings that are supported by "'ample, credible evidence' . . . or 'substantial evidence'." *People v. Ledesma*, 729 P.2d 839, 869 (Cal. 1987) (quoting *In re Branch*, 449 P.2d 174, 176, n.1 (Cal. 1969)).

Moreover, this Court has treated California's system of review by successive original writs as the functional equivalent of an appellate system. In *Gardner v. California*, 393 U.S. 367 (1969), for example, the Court concluded that a prisoner seeking to pursue his habeas remedy in the higher courts following the superior court's denial of his petition was entitled to a free transcript of the superior court proceedings, just like a conventional appellant. This was because there were strong similarities between a habeas petition to a higher court and an appeal: The new petition must "reflect[] what transpired in superior court," *id.* at 368, and the petitioner "carries the burden of convincing the appellate court that the hearing before the lower court was either inadequate or that the legal conclusions from the facts deduced were erroneous," *id.* at 370.[22]

In sum, the common practice in California of seeking post-conviction appellate review by filing original petitions in the court of appeal and the California Supreme Court is the functional equivalent of filing formal appeals. An appeal is commonly understood as "a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority;

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22 Additionally, federal courts sometimes treat the California Supreme Court's consideration of an original habeas petition as a review of the decision of the court of appeal, rather than a *de novo* adjudication of the case. For instance, the Ninth Circuit treats California Supreme Court petitions denied without comment as procedurally barred, if the court of appeal had previously denied the same claims on procedural grounds. *See Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000). This practice is based on a presumption that where "the last reasoned opinion on the claim explicitly imposes a procedural default . . . a later decision rejecting the claim did not silently disregard that bar and consider the merits." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal." *Black's Law Dictionary* 94 (7th ed. 1999); *see also Black's Law Dictionary* 96 (6th ed. 1990). California's system clearly fits this definition. Accordingly, the interpretation of section 2244(d)(2) advocated above—that an application for state collateral review remains "pending" from the time it is first filed until the final disposition of any timely appeals—should apply equally to the California system, and section 2244(d)(2) should toll the federal limitations period for "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application." *Nino*, 183 F.3d at 1006 (citation omitted).

B. Tolling the Federal Limitations Period While a California Prisoner Properly Pursues Appellate Review of His State Habeas Petition Accords with the Purposes of Section 2244(d)(2) and AEDPA.

The principles of comity, finality, and federalism that AEDPA seeks to further, *see Duncan*, 121 S. Ct. at 2127, are bolstered by applying the interpretation of section 2244(d)(2) advocated above to California prisoners who timely file habeas petitions in the state appellate courts as a means of seeking review of their case.

In contrast, as the Warden appears to acknowledge, his construction of section 2244(d)(2) would encourage California prisoners to forgo full state post-conviction review by "by-passing the superior and/or appellate courts and instead filing [their] original petition[s] directly with the California Supreme Court." Br. 26. The fact that the Warden's construction would encourage prisoners to proceed in this fashion is powerful evidence of the conflict between his interpretation and the principles of comity and federalism underlying the statute. AEDPA's exhaustion requirement is designed to serve those principles by "giv[ing] the state courts a full and fair opportunity to resolve federal constitutional claims be-

fore those claims are presented to the federal courts." *O'Sullivan*, 526 U.S. at 845. Asking a state supreme court to adjudicate a habeas petition without the benefit of any lower court proceedings to develop the facts and sharpen the legal issues hardly affords the state courts a "full and fair opportunity" to resolve the issues.[23] Rather, it minimizes the state supreme court's chances of identifying and remedying any constitutional error in the case. This result cannot be squared with the principles of comity and federalism animating AEDPA's exhaustion requirement. *See id.* (emphasizing need to avoid the "unseem[liness] of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance.") (internal quotation marks omitted).

California has chosen not to specify precise times for the pursuit of state collateral review at the appellate level. Rather, it has determined that original habeas petitions filed in the state court of appeal or supreme court are subject only to the general requirement that they be filed "within a reasonable time." *In re Harris*, 855 P.2d at 398 n.7. Accordingly, tolling AEDPA's statute of limitations while a California prisoner's habeas petition is "pending" in the California courts requires tolling the statute until the final disposition of

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[23] Indeed, there is a serious question whether a single filing in the state supreme court would satisfy the requirement that a petitioner "give the state courts one full opportunity to resolve any constitutional issues by invoking *one complete round* of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845 (emphasis added). In *O'Sullivan*, that requirement obliged the prisoner to "use the State's established appellate review procedures before he present[ed] his claims to a federal court." *Id.* If that requirement applies here, the filing of a single petition in the California Supreme Court may not suffice to exhaust the remedies available under California law. Moreover, even if such a filing could satisfy the exhaustion requirement in theory, in practice it may not suffice if the California Supreme Court denies the petition with leave to file in the superior court, or redirects the case to the superior court by issuing an order to show cause returnable to the lower court. *See, e.g., Leftwich v. Coiner*, 424 F.2d 157, 160-61 (4th Cir. 1970).

the petition by the state supreme court, provided that court's review was sought "within a reasonable time." Only by construing section 2244(d)(2)'s tolling provision in this fashion will this Court accord California "the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Coleman*, 501 U.S. at 726.[24]

Amicus the Criminal Justice Legal Foundation invites this Court to disregard California's choice to permit the pursuit of habeas review "within a reasonable time," and to impose on California habeas petitioners a set of appellate filing requirements imported from other legal and procedural contexts. *See* Br. 19-23. That invitation should be rejected. *Amicus* does not—and could not—identify any congressional intent in section 2244(d)(2) to ignore a state's timing rules for seeking appellate habeas review in favor of other filing rules developed in other legal contexts. Indeed, to do that here would fail entirely to accord California the "respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Coleman*, 501 U.S. at 726. AEDPA was enacted out of a recognition of the need for such respect, and its provisions should not be construed in a fashion so wholly at odds with that purpose. Rather, section 2244(d)(2) should be

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[24] Contrary to the Warden's suggestion (Br. 18-19), this reading of section 2244(d)(2) does not dictate any particular outcome in cases such as *Welch v. Newland*, 267 F.3d 1013 (9th Cir. 2001). In *Welch*, the Ninth Circuit held that a prisoner's application for collateral review was "pending" for the four years between the superior court's decision and the filing of a petition in the California Supreme Court, even though the two petitions raised entirely different claims. *See id.* at 1015, 1017-18. Here, in contrast, Mr. Saffold's petition to the California Supreme Court contained the precise claims that he had earlier raised in his petitions to the superior court and court of appeal. Thus, he employed California's system of original writs in an appellate fashion, seeking higher courts' review of claims that had been denied below. But that is not the case where, as in *Welch*, a prisoner effectively abandons his initial claims and subsequently files a petition raising entirely new claims.

interpreted to toll the statute during the entire period that a California prisoner is "appropriately pursuing and exhausting his state remedies," *Nino*, 183 F.3d 1004, which includes seeking review by the state court of appeal and supreme court "within a reasonable time."[25]

III. THE NINTH CIRCUIT PROPERLY CONCLUDED THAT MR. SAFFOLD HAD COMPLIED WITH CALIFORNIA'S COLLATERAL REVIEW PROCEDURES.

For the foregoing reasons, the issue in this case reduces to the fact-bound question whether Mr. Saffold's submission to the California Supreme Court was within the time permitted for such filings under state law. Mr. Saffold has suggested and continues to believe that this issue does not merit plenary consideration by this Court.[26] If the Court nonetheless wishes to resolve the issue, however, as discussed below, California law is inherently unclear, calling for an *ex post* determination of "reasonableness." The California Supreme Court persists in a practice of minute orders that frequently, and certainly in this case, do not clearly resolve the issue. In these circumstances, therefore, given that the California Supreme Court clearly reached the merits of at least some of Mr. Saffold's claims, the Ninth Circuit correctly proceeded on the basis that Mr. Saffold's state supreme court petition had not been filed after California's unspecified deadline. If this Court decides the issue at all—rather than dismissing the writ at this point—the Court should proceed on the same basis.

A. California's Law on Untimeliness Does Not Establish That Mr. Saffold's Petition to the California Supreme Court Was Untimely.

In most states, it is not difficult for habeas petitioners to ascertain the deadlines under state law for filing appeals. If they file out of time, they should know it, and further should understand that they must file a motion for leave to do so. A federal court subsequently reviewing whether a habeas appeal had been timely filed can make the determination by simple reference to the docket sheet and the calendar.

By contrast, California's vague and shifting timeliness rules give no clear answer as to how soon after a ruling in the court of appeal an original petition to the state supreme court must be filed. California law could, but does not, set forth a definite time period for such a filing. Instead, such a filing is subject to the indeterminate requirement that it be filed "within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis for the claim."

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[25] The Warden misses the mark by suggesting (Br. 18) that affirming the judgment below risks permitting ten-year delays in a prisoner's pursuit of state collateral relief. Under the reading of section 2244(d)(2) advocated here, the tolling period could last ten years only if the laws of the state in question provided prisoners with that amount of time within which to file their appeals. Any prejudice caused by such a delay would be suffered by the state, and only the state: the delay could frustrate the state's interest in finality, but no other entity has a cognizable interest in the finality of that state's judgments. Thus, the only entity conceivably prejudiced by these hypothetical delays—the state—is the precise entity with the power to stop them, by limiting the time prisoners have under state law to file their appeals. The state is perfectly able, therefore, to protect against any delay that it considers intolerable. Moreover, even if a state did allow ten years for filing an appeal from a denial of a state habeas petition, a prisoner serving a non-capital sentence would be unlikely to wait so long to appeal. As the Powell Committee observed, "prisoners serving an ordinary term of years have every incentive to bring their claims to resolution as soon as possible in order to gain relief." Powell Committee Report 5.

[26] *See* Respondent's Motion To Dismiss Writ of Certiorari As Improvidently Granted 8, 10 (citing *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (noting the importance of disposing of cases on the merits only in "cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."), and *Powell v. Nevada*, 511 U.S. 79, 86-87 (1994) (Thomas, J., dissenting) (quoting *Layne & Bowler Corp.*)).

In re Harris, 855 P.2d at 398 n.7. State case law has not given meaningful content to this standard. *See Morales v. Calderon*, 85 F.3d 1387, 1390-92 (9th Cir.) (noting the lack of clarity in the case law on California's timeliness rules), *cert. denied*, 519 U.S. 1001 (1996). Accordingly, the Warden does not, and cannot, identify any rule clearly establishing that the four and one-half months from the decision by the state court of appeal to the filing of Mr. Saffold's petition in the California Supreme Court was an "unreasonable" delay—particularly in light of the unrebutted evidence that he submitted his petition on the very day he received a copy of the court of appeal's adverse order. In fact, as reflected in materials reproduced in the Appendix to this Brief, the four and one-half months in this case was within the time that has been allowed for such a submission by the Supreme Court.[27]

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[27] The California Supreme Court denied Mr. Saffold's petition on May 27, 1998. Pet. App. G-1. In 1998, the California Supreme Court adjudicated numerous petitions for habeas corpus filed many months after the court of appeal's decision on the merits, and did not deny the petitions as untimely. *See, e.g., In re Davis*, S067518, *infra* 1a-5a (eighteen months between court of appeal's denial on the merits and prisoner's filing in the supreme court; supreme court denied petition without any reference to delay); *In re Sampson*, S066428, *infra* pp. 7a-12a (nine months between court of appeal's denial on the merits and prisoner's filing in the supreme court; supreme court denied petition without any reference to delay); *In re Diaz*, S067327, *infra* pp. 13a-16a (over six months; denial without reference); *In re Weldon*, S066884, *infra* pp. 17a-20a (four months; denial without reference); *In re Saenz*, S067688, *infra* pp. 21a-24a (over four months; denial without reference). Copies of the California Supreme Court case files for each of these cases are being lodged with the Clerk. Although the California Supreme Court may in other cases refer to a "lack of diligence" when denying petitions filed after similar intervals, the court's failure to make any such reference in these cases renders the law in this area unclear at best. Moreover, under this Court's established approach for construing summary state court dispositions, the California Supreme Court's minute orders in *Davis* and *Sampson* are necessarily deemed to be based on the merits, and *not* on any finding of untimeliness. *See Ylst*, 501 U.S. at 803 ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. . . . [W]e will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place.").

Moreover, the Clerk of the California Supreme Court has advised prisoners seeking guidance regarding the filing requirements in that court that "there is *no deadline* within which to file a Petition for Writ of Habeas Corpus." Letter for Bobby R. Appleberry, from Robert F. Wandruff, Court Administrator and Clerk of the Supreme Court (June 26, 1997) (emphasis in original) (reproduced *infra* p. 25a); *see* letter for Bobby R. Appleberry, from Robert F. Wandruff (Jan. 21, 1998) ("Although Petitions for Review are jurisdictional and must be filed within specified time periods from decisions of the Court of Appeals, Petitions for Writ of Habeas Corpus can be filed at any time.") (reproduced *infra* p. 27a); letter for Jeffrey D. McClure, from Robert F. Wandruff (July 2, 1997) ("[Y]ou may file a Petition for Writ of Habeas Corpus with this Court at any time.") (reproduced *infra* p. 29a).

B. No Prior Decision in this Case Establishes That Mr. Saffold's Petition to the California Supreme Court Was Untimely.

Given the absence of a clear state rule, the federal courts are dependent on the California courts to declare, in a particular case, that a filing was out of time. In this case, the California Supreme Court's ruling is itself unclear. Because of this, and because the California Supreme Court clearly reached the merits, the Ninth Circuit proceeded on the basis that Mr. Saffold's submission to the California Supreme Court was timely. This Court should defer to that determination. *See UNUM Life Ins. Co. v. Ward*, 526 U.S. 358, 368 (1999) ("We do not normally disturb an appeals court's judgment on an issue so heavily dependent on an analysis of state law."); *Runyon v. McCrary*, 427 U.S. 160, 181-82 (1976) (same); *General Box Co. v. United States*, 351 U.S. 159, 165 (1956) ("We ordinarily accept the determinations of the Courts of Appeals on questions of local law, and we do so here."). At a minimum, this Court should not conclude that Mr. Saffold failed to satisfy the requirements of state law in submitting his petition to the state supreme court.

1. *The California Supreme Court did not clearly rule Mr. Saffold's petition to be out of time.*

The California Supreme Court's denial of Mr. Saffold's habeas petition was confined to a one-line order, unsupported by any citation, that stated simply: "Petition for writ of habeas corpus DENIED on the merits and for lack of diligence." Pet. App. G-1. It is clear from this order that the state supreme court reached the merits of at least some of Mr. Saffold's claims, and that with respect to at least some of his claims, the court determined that he had not, in some respect, met the "diligence" requirements of state law. Nothing more can be determined with certainty.

The critical question, of course, is what the court meant by "lack of diligence." As the Ninth Circuit observed, while on its face the reference could be to the four and one-half months between the California Court of Appeal's denial of Mr. Saffold's petition to that court and the filing of his petition in the California Supreme Court, it could also be to the five years that elapsed between the time Mr. Saffold's convictions became final and the filing of his first state habeas petition in the California Superior Court. Pet. App. A-11-12. If the latter was intended, the ruling might conceivably create certain procedural bars, but because more than four years of that time preceded the enactment of section 2244(d)(2), it would be of no relevance to the present inquiry. *See Duncan*, 121 S. Ct. at 2130 & n.1 (Stevens, J., concurring in part and concurring in the judgment) (collecting cases holding that, for prisoners whose convictions became final prior to AEDPA, the one-year limitations period began to run on AEDPA's date of enactment, April 24, 1996).

It is also possible that "lack of diligence" was not a reference to timeliness at all. As discussed more fully in Mr. Saffold's Motion To Dismiss Writ of Certiorari As Improvidently Granted (Mot. 5-6), the California courts use "lack of diligence" to describe not just untimeliness, but also the failure to raise certain claims on direct appeal before pressing

them on habeas. *See Ex parte Dixon*, 254 P.2d 513 (Cal. 1953) (establishing the general rule barring state habeas petitioners from raising claims that they should have raised on direct appeal); *In re Ronald E.*, 562 P.2d 684, 688 (Cal. 1977) (noting that petitioner had neither raised his claim on direct appeal nor justified his failure to do so, and holding that, "[i]n view of such *lack of diligence* on petitioner's part we concluded that he has waived the constitutional defects he now claims") (emphasis added).

Indeed, in *Thompson v. Procunier*, 539 F.2d 26 (9th Cir. 1976) (per curiam), the Director of the California Department of Corrections argued that the California Supreme Court's summary denial of a habeas petition alleging ineffective assistance of counsel was based on this precise kind of default. *Id.* at 27-28. The prisoner in that case failed to file a direct appeal of his conviction, and then raised ineffective assistance claims in three successive habeas petitions to the state superior court, court of appeal, and supreme court. *Id.* at 27. The California Supreme Court denied the petition without giving any indication whether it had reached the merits. When the prisoner then filed a federal habeas petition, the Director argued that the petition should be dismissed for failure to exhaust state remedies, on the theory that the prisoner failed to raise his ineffective assistance claims on direct appeal and that his failure to do so was the basis for the California Supreme Court's denial of his habeas petition. *Id.* at 27-28. Observing that, "[i]n California, issues relating to claimed ineffectiveness of counsel may be presented by appeal," *id.* (citing *In re Brown*, 511 P.2d 1153 (1973)), the Ninth Circuit stated that the Director might be correct in asserting that the California Supreme Court's denial was based upon "the broad rule . . . to the effect that habeas corpus normally will not lie where a remedy by appeal exists." *Id.* at 28. Ultimately, however, the court concluded that it was unable to determine from the face of the California Supreme Court's minute order whether the order was based on this default rule.

In light of the possibility—asserted by the state itself and recognized by the Ninth Circuit in *Thompson*—that a California habeas petitioner defaults on certain ineffective assistance claims not raised on direct appeal, the Warden is wrong to argue that "lack of diligence" could not have referred to such default in this case. *See* Opposition To Motion To Dismiss Writ As Improvidently Granted 5-7. It is true that in *In re Robbins*, 959 P.2d 311 (Cal. 1998), the California Supreme Court in a footnote ranging far afield from the issues before it in that case stated that the rule barring claims raised for the first time on habeas corpus does not apply "to claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely upon the appellate record." *Id.* at 340 n.34. But *Robbins* was decided *after* the California Supreme Court denied Mr. Saffold's petition, and it is unclear whether the *Robbins* court meant to clarify what its practice had always been, or to announce what its practice would be in the future. The Warden has cited no precedent prior to the California Supreme Court's decision in Mr. Saffold's case clearly holding that *all* ineffective assistance claims—including those that could have been raised on direct appeal—are exempt from the rule barring claims on habeas that could have been raised on direct appeal. Indeed, the case cited by *Robbins* itself on this point, *People v. Mendoza Tello*, 933 P.2d 1134 (Cal. 1997), recognized that where the trial record is adequate to resolve the claim, it is appropriate to raise ineffective assistance claims on direct appeal. *See id.* at 1136 (citing *People v. Camilleri*, 220 Cal. App. 3d 1199, 1202 (1990), as an example of such a case).[28] As discussed

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[28] To be sure, *Mendoza Tello* stated that claims of ineffective assistance that could *not* have been resolved on direct appeal because of the insufficiency of the trial record may be pressed for the first time on habeas, *see id.* at 1135 (where "the [trial] record sheds no light on why counsel acted or failed to act in the manner challenged, ... [a] claim of ineffective assistance *in such a case* is more appropriately decided in a habeas corpus proceeding") (emphasis added), but that is simply the obverse of the longstanding rule—cited by the state itself in the ineffective assistance context in *Thompson*, *supra*—that claims that *could* have been raised on direct appeal must be raised there, or risk being barred on habeas. *Mendoza Tello* did not hold anything clearly to the contrary of that general rule.

in Mr. Saffold's Motion To Dismiss (Mot. 5-6 & n.4), one of Mr. Saffold's claims of ineffective assistance of trial counsel is indeed arguably based entirely on the trial record.[29] Thus, the reference to "lack of diligence" might reflect a determination that Mr. Saffold should have raised that claim on direct appeal, not a finding of untimeliness at all.

The point here is not that the California Supreme Court's reference to a "lack of diligence" had a particular meaning; to the contrary, the point is that there is no way for this Court to determine what it meant, and particularly no way to conclude that the California Supreme Court was referring specifically to the four and one-half months between the decision of the court of appeal and Mr. Saffold's petition to the state supreme court. Indeed, of the three possibilities Mr. Saffold has been able to identify (pre-AEDPA delay; waiver for failure to raise one of his claims on direct review; and this four-and-one-half-month period), the latter period—during which, after all, the unrebutted evidence shows Mr. Saffold had no notice of the court of appeal's decision—appears to be the *least* likely. *See supra* n.27.

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[29] The fourth claim in Mr. Saffold's petition to the California Supreme Court asserted that his trial counsel failed to prepare for a hearing on a suppression motion, and that counsel subsequently "withdrew the motion because of his incompetence." J.A. 35. Mr. Saffold first made that claim in his petition to the California Superior Court. *Id.* at 11-12. That court rejected the claim with reference solely to the record, *id.* at 19, thus confirming the possibility that the California Supreme Court regarded the claim as one that could have been brought on direct appeal. Mr. Saffold does not concede any default in this regard, but for present purposes it suffices to observe that the California Supreme Court might have had such default in mind when it used the phrase "lack of diligence."

2. *The Ninth Circuit did not construe the California Supreme Court's order as a denial for untimeliness.*

Contrary to the implication of the question presented in this case, the Ninth Circuit did *not* conclude that Mr. Saffold's petition was untimely. In the absence of a clear ruling from the California Supreme Court on the issue, the Ninth Circuit instead proceeded on the basis that the state supreme court petition had been timely filed.

This is clear from the Ninth Circuit's observation that the case "does not" present "the question that [the Ninth Circuit] left open" in its prior decision in *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999). Pet. App. A-11. In *Nino*, the Ninth Circuit left open the question "whether tolling pursuant to AEDPA should be applied if the California state courts have dismissed a state habeas petition as untimely because the petitioner engaged in substantial delay in asserting habeas claims." 183 F.3d at 1006 n.4. The Ninth Circuit in this case continued to reserve that question, because it concluded that here, as in *Nino*, the state high court had *not* dismissed the state habeas petition as untimely.

This point is reconfirmed by the Ninth Circuit's subsequent decision in *Welch v. Newland*, 267 F.3d 1013, *mandate stayed*, 268 F.3d 1124 (9th Cir.2001). In *Welch*, the Ninth Circuit explained that in *Saffold*, it had "viewed the California Supreme Court as having recognized the petitioner's use of post-conviction relief procedures to have been 'proper,' and thus within AEDPA's tolling provision." *Id.* at 1017; *see id.* at 1016 n.5 ("Notwithstanding the language concerning the petitioner's 'lack of diligence,' we construed the California Supreme Court's order as a dismissal on the merits."). Indeed, *Welch* again observed that *Nino* had left undecided the question whether tolling would be proper "if the California Supreme Court denied a petition on the ground of untimeliness," and *Welch* itself continued to leave that question unanswered. *Id.* at 1016 n.4. Clearly, the question could not

still be unanswered by the time of *Welch* if, as the Warden maintains, it had been answered four months earlier in this case.[30]

In short, although the Ninth Circuit below noted that the California Supreme Court's reference to "lack of diligence" could have two different timeliness-related meanings, it did not determine that Mr. Saffold's petition to the state supreme court was untimely under California law, or that the California Supreme Court had denied the petition because it was untimely. Thus, the Warden is simply wrong to characterize the Ninth Circuit's decision as holding that, "when a California Supreme Court ruling dismissing a habeas corpus petition for untimeliness alternatively addresses the merits, AEDPA's statute of limitations period is tolled from the filing of the state petition in the trial court until the California Supreme Court's denial of the habeas petition." Br. 9-10. To the contrary, as the Ninth Circuit made clear both in *Saffold* and *Welch*, the Ninth Circuit construed the state high court's order here as deeming Mr. Saffold's submission to be timely.[31]

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[30] *Welch* also stated that the Ninth Circuit's decision here "turned, not on the length of the time gap between [Mr. Saffold's] petitions [to the superior court, court of appeal, and state supreme court], but on the fact that the California Supreme Court had addressed Saffold's petition on the merits." 267 F.3d at 1016. Contrary to the Warden's assertions, however, this passage simply reflects the Ninth Circuit's determination—in light of the absence of any specific time limitations in California's collateral relief procedures, the ambiguity of the California Supreme Court's order, and the fact that the California Supreme Court reached the merits of at least some of Mr. Saffold's claims—to proceed on the basis that Mr. Saffold's petition had not been dismissed as untimely.

[31] As explained in Mr. Saffold's Motion To Dismiss Writ of Certiorari As Improvidently Granted, the Seventh Circuit's decision in *Fernandez v. Sternes*, 227 F.3d 977 (7th Cir. 2000), also misunderstands the Ninth Circuit's decision in this case. *See* Mot. 7-8. Like the Warden, the *Fernandez* court understood the Ninth Circuit in this case to have answered the question left unanswered in *Nino*: whether an untimely state petition can toll AEDPA's one-year limitations period. But because the decision below is premised on the conclusion that Mr. Saffold's petition to the state

C. In the Circumstances of this Case, the Ninth Circuit Correctly Deemed Mr. Saffold's State Supreme Court Petition To Have Been Timely Filed.

The Ninth Circuit charted the appropriate course in this case. Given the absence of any specific time limitation in California's collateral relief procedures, the ambiguity of the California Supreme Court's order, and the indisputable fact that the California Supreme Court reached the merits of at least some of Saffold's claims, the court below was correct to proceed on the basis that Saffold's petition to the California Supreme Court was not untimely. This Court should not disturb the appeals court's judgment on this point. *See UNUM Life Ins. Co.*, 526 U.S. at 368; *Runyon*, 427 U.S. at 181-82; *General Box Co.*, 351 U.S. at 165. Rather, it should affirm the Ninth Circuit's case-specific decision to "construe[] the California Supreme Court's order as a dismissal on the merits." *Welch*, 267 F.3d at 1016 n.5.

Moreover, to permit an ambiguous "lack of diligence" ruling to bar such a claim would attribute to Congress an unlikely intent to impose unique burdens on California state prisoners. In virtually every other state in the Union, prisoners can readily understand when they need to file their state habeas appeals in order to be timely and thus (under the circuit courts' unanimous interpretation of section 2244(d)(2)) to continue the pendency of their state habeas application. In California, however, as discussed above, there are no clearly stated time limits. To permit non-specific references to "lack of diligence" to bar prisoners' claims on timeliness grounds in cases like this one would deprive prisoners of any effective notice about how to exhaust their state remedies while receiving the benefit of section 2244(d)(2)'s tolling. Such a ruling would do nothing to encourage California—through legislative or judicial action—to resolve this confusion by enacting or judicially announcing clear deadlines. At a minimum, it does not impose an unreasonable burden before barring a claim on timeliness grounds to require that the state supreme court's order make clear that its "lack-of-diligence" ruling in fact supports such a result.

supreme court was timely filed, and actually adheres to the unanimous rule among the circuit courts (including the Seventh Circuit) that the pursuit of state collateral review tolls section 2244(d)(1)'s limitations period from the initial filing until the final resolution of any timely appeal, there is no reason to believe that, if presented with facts like those of *Fernandez*, the Ninth Circuit would rule any differently than the Seventh.

At most, this Court should remand the case for further factual development on whether Mr. Saffold's petition to the California Supreme Court was in fact timely. The Fourth Circuit recently adopted this approach under similar circumstances in *Allen v. Mitchell*, No. 00-7439, 2001 WL 1658838 (4th Cir. Dec. 27, 2001). In that case, the court observed "the absence of a fixed appellate deadline under North Carolina law" for filing petitions for certiorari in the North Carolina Supreme Court. *Id.* at *3. Rather, much like California, North Carolina provides only that such petitions must be filed "without unreasonable delay." *Id.* (quoting N.C. R. App. P. 21(c)). Noting that the North Carolina Supreme Court had not clearly dismissed Allen's petition to that court as untimely, the Fourth Circuit stated that it was unable to "say that Allen's petition was necessarily untimely solely because it was filed *more than four years* after" the decision of the state superior court. *Id.* (emphasis added). Similarly, this case presents at most the *possibility* that Mr. Saffold's pursuit of state collateral remedies was untimely, and the Court could remand for further factual development on this issue. For the reasons given above, however, Mr. Saffold submits that judicial economy, fairness, and the statutory scheme are better served by the Ninth Circuit's approach, which places the responsibility for establishing clear rules on the state, the only party that can do so.

CONCLUSION

The Ninth Circuit's decision in this case "merely follow[ed] the tolling rule set out [by that court] in *Nino*," *Welch*, 267 F.3d at 1016, and is consistent with the courts of appeals' unanimous construction of section 2244(d)(2) in this context. This Court should affirm that unanimous construction and the Ninth Circuit's application of it here. Alternatively, the Court should dismiss the writ as improvidently granted or remand the case for further proceedings to determine whether Mr. Saffold's petition to the California Supreme Court was timely under state law.

Respectfully submitted,

SETH P. WAXMAN
DAVID W. OGDEN
TREVOR W. MORRISON
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

MARY KATHERINE MCCOMB
Counsel of Record
OFFICE OF STATE PUBLIC DEFENDER
801 K Street, Suite 1100
Sacramento, CA 95814
(916) 327-0459

Counsel for Respondent Tony Eugene Saffold

January 2002

APPENDIX A

S067518

IN THE SUPREME COURT OF CALIFORNIA

[FILED May 27, 1998]

IN RE JOHN G. DAVIS
ON
HABEAS CORPUS

Petition for writ of habeas corpus is DENIED.

/s/
Chief Justice

Name JOHN G. DAVIS
Address P.O. Box 3461
Corcoran, California 93212
CDC or ID Number H-23360

IN THE SUPREME COURT FOR THE
STATE OF CALIFORNIA

[FILED Jan. 26, 1998]

JOHN G. DAVIS Petitioner	PETITION FOR WRIT OF HABEAS CORPUS
vs.	No. S067518
G. GALAZA, WARDEN Respondent	

INSTRUCTIONS - READ CAREFULLY

Read the entire form *before* answering any questions.

This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.

Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."

If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.

If you are filing this petition in the Court of Appeal, file the original and four copies.

If you are filing this petition in the California Supreme Court, file the original and thirteen copies.

Notify the Clerk of the Court in writing if you change your address after filing your petition.

In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(f)(1) at the California Rules of Court [as adopted effective January 1, 1992]. Subsequent amendments to Rule 44-(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

Form Approved by the Judicial Council of CaliforniaMC-275 (Rev. January 1, 1992)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

[FILED July 11, 1996]

In re	B 102280
JOHN G. DAVIS	(Super.Ct.No.YA021301)
On Habeas Corpus	(William R. Hollingsworth, Jr., Judge)

ORDER

THE COURT:*

The petition for writ of habeas corpus filed May 21, 1996, has been read and considered together with Los Angeles Superior Court case file YA 021301, People vs. John G. Davis.

The petition is denied.

The superior court file contains defendant's April 18, 1995 application for a certificate of probable cause. The application was denied for absence of facts warranting issuance of a certificate of probable cause. This was a correct ruling. The application contains only checked-off pre-printed conclusions of ineffective trial counsel without specification of facts satisfying Penal Code section 1237.5, subdivision (a).

The superior court file does not contain anything supporting the claim that defendant's trial counsel was ineffective. The "Guilty Plea in Superior Court" form initialed by defendant in connection with his nolo contendre plea shows that the maximum sentence defendant faced upon a conviction was 30 years.

The superior court file contains defendant's July 13, 1995, motion for a complete record. That application was correctly denied by the superior court on the ground no

appeal was pending and the certificate of probable cause had been denied. Convicted felons who fail to perfect a timely appeal are not entitled to a complete record of their case, at state expense, just to record for possible issues to be raised in a habeas corpus petition. Such an application for record must state specific facts showing particular claims of error with possible merit.

The petition does not include an corroboration that defendant mailed letters to his trial counsel within the 60-day appeal period requesting aid in perfecting an appeal.

/s/	/s/	/s/

* VOGEL (C.S.) P.J., HASTINGS, J., BARON, J.

APPENDIX B

S066428

IN THE SUPREME COURT OF CALIFORNIA

[FILED May 27, 1998]

IN RE EDDIE L. SAMPSON

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED.

/s/
Chief Justice

Name Eddie L. Sampson

Address Salinas Valley State Prison

Facility B-5, 223L, P.O. Box 1040

Soledad, Ca. 93960-1040

CDC or ID Number K01633

CALIFORNIA SUPREME COURT

[FILED Dec. 1, 1997]

Eddie L. Sampson
Petitioner

vs.

James Gomez, et. al.
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

No. _____

INSTRUCTIONS — READ CAREFULLY

Read the entire form *before* answering any questions.

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Approved by the Judicial Council of California for use under Rules 56.5 and 201(f)(1) of the California Rules of Court [as adopted effective January 1, 1992]. Subsequent amendments to Rule 44(b) may change the number of copies be furnished the Supreme Court and Court of Appeal.

Form Approved by the Judicial Council of California MC-275 (Rev. January 1, 1992)

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

[FILED Feb. 10, 1997]

In re EDDIE LEE SAMPSON,	D027688
On	(San Diego County
Habeas Corpus.	Super. Ct. No. SCD106152)

THE COURT:

The petition for writ of habeas corpus has been read and considered by Justices Huffman, Haller and McIntyre. Petitioner currently has an appeal pending before this court (*People v. Sampson*, D025541) which arises out of a 1995 conviction in Superior Court case number SCD114458. In the pending case petitioner has been convicted of residential burglary (Pen. code, §§ 459, 460) with a finding that he had a prior serious felony conviction (a strike) within the meaning of Penal Code section 667, subdivisions (b) - (i). The strike conviction resulted from petitioner's 1994 no contest plea to residential burglary (Pen. Code §§ 459, 460) in Superior Court case number SCD106152.

In this petition, petitioner contends appellate counsel in D025541/SCD114458 is providing ineffective assistance of counsel because he has refused to raise the claim that the trial court erred when it denied an in limine motion to invalidate the strike conviction. Petitioner contends his strike conviction is invalid because:

1) Trial counsel who represented him in that case did not properly investigate a defense.

2) When the trial court took his no contest plea pursuant to *People v. West*: (1970) 3 Cal.3d 595, it erred in finding a factual basis for the plea.

As to trial counsel's alleged failure to investigate, petitioner fails to support his claims by declarations of his

purported witnesses or otherwise. Moreover, he fails to demonstrate that investigation and presentation of the purported defense would have resulted in a different outcome.

As to the alleged court error in taking his plea, Penal Code section 1192.5 requires a court to satisfy itself that a plea is "freely and voluntarily made and, that there is a factual basis for the plea." The trial judge should develop the factual basis on the record but a defendant may enter a guilty plea even while maintaining his innocence. (*People v. Watts* (1977) 67 Cal.App.3d 173, 178-180.) Moreover, a trial court's finding will be upheld where defense counsel stipulates to the factual basis and the record demonstrates that the basis exists. (*People v. Mickens* (1995) 38 Cal.App.4th 1557, 1564-1565.)

Here, petitioner contends there was no factual basis presented in the record. He further contends the trial court made a conclusory finding based solely on defense counsel's stipulation that there was a factual basis for the plea in the preliminary hearing transcript. Petitioner is mistaken. While defense counsel did stipulate that the preliminary hearing transcript provided a factual basis for the plea, it was not the sole basis for the court's decision. Rather, the transcript from the change of plea hearing demonstrates there was adequate information presented, independent of the stipulation, from which the court could conclude there was a factual basis for the plea.

The court at least three times during the change of plea hearing stated it would not take the plea without there being a factual basis to demonstrate petitioner was guilty of the charge. The court examined the petitioner extensively. Petitioner had been arrested at approximately midnight outside a residence. His codefendant was found inside the residence having entered through a second story window. Petitioner's clothes were dirty in a manner consistent with his having assisted the codefendant to enter the building. Petitioner at the change of plea hearing claimed he had not assisted the codefendant and that his clothes were dirty because he had earlier helped

his aunt to move. However, he admitted that he and the codefendant had been having a conversation before the codefendant entered the residence. He further admitted he knew what was going on and that he knew his codefendant's purpose was to steal something. It is evident from the transcript that the court reviewed photographs taken at the time of petitioner's arrest. The photographs showed both the petitioner in his dirty clothes and the residence including the window through which the codefendant entered. Shortly after having reviewed the photographs, the court accepted the plea. Despite the petitioner's claim of innocence, there was sufficient evidence to establish a factual basis for the plea.

Petitioner also claims that he did not know the consequences of his plea until after he was charged in the current case. The transcript of the change of plea hearing shows petitioner was fully advised of the consequences of his plea including the fact it was a serious felony which would be a strike under the three strikes law. The court explained in detail that upon the conviction of any new felony, even petty theft or possession of a rock of cocaine, petitioner would have to serve at least double the base term of the new felony. The record is clear that petitioner knew the consequences of his plea and that it was freely and voluntarily given.

The record does not demonstrate any error by the court in accepting petitioner's plea in Superior Court case number SCD106152. Nor does it demonstrate ineffective assistance of trial counsel in that case. The trial judge in the current case (D025541/SCD114458) did not abuse his discretion when he denied petitioner's motion in limine to invalidate petitioner's strike conviction. Appellate counsel was not ineffective for refusing to raise a meritless issue.

The petition is denied.

HALLER, Acting P.J.

Copies to: All parties

APPENDIX C

S067327

IN THE SUPREME COURT OF CALIFORNIA

[FILED May 27, 1998]

IN RE OSCAR DIAZ
ON
HABEAS CORPUS

Petition for writ of habeas corpus is DENIED.

/s/
Chief Justice

Name OSCAR, DIAZ

Address S.V.S.P.

P.O. BOX 1020

SOLEDAD, CALIFORNIA 93960

CDC or ID Number J77827

SUPREME COURT OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

[FILED Jan. 20, 1998]

In re OSCAR, DIAZ Petitioner	PETITION FOR WRIT OF HABEAS CORPUS
vs.	
WARDEN: GARY, LINDSEY Respondent	No.S067327

INSTRUCTIONS - READ CAREFULLY

Read the entire form *before* answering any questions.

This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.

Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is, "continued on additional page."

If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.

If you are filing this petition in the Court of Appeal, file the original and four copies.

If you are filing this petition in the California Supreme Court, file the original and thirteen copies.

Notify the Clerk of the Court in writing if you change your address after filing your petition.

In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(f)(1) of the California Rules of Court [as adopted effective January 1, 1992]. Subsequent amendments to Rule 44(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

Form Approved by the Judicial Council of California MC-275 (Rev. January 1, 1992)

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
JOSEPH A. LANE, CLERK

DIVISION: 2 DATE: 06/27/97

S.v.s.p. Cdc
Oscar Diaz
J-77827
P.O. Box 1050
Soledad, CA. 93960

RE: Diaz, Oscar
VS.
In Re Oscar Diaz On H.c.
2 Criminal B112647
Los Angeles No. BA114239

THE COURT:

The petition for writ of Habeas Corpus is denied.

APPENDIX D

S066884

IN THE SUPREME COURT OF CALIFORNIA

[FILED June 24, 1998]

IN RE MARK WELDON

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED.

/s/ _____
Chief Justice

Name MARK WELDON
Address 3B04-118-L
Post Office Box 3466
Corcoran, CA 93212
CDC or ID Number J-57944

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

[FILED Dec. 30, 1997]

MARK WELDON
Petitioner

vs.

GEORGE M. GALAZA, Warden
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

No. S066884

INSTRUCTIONS - READ CAREFULLY

Read the entire form *before* answering any questions.

This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.

Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."

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In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(f)(1) of the California Rules of Court [as adopted effective January 1, 1992]. Subsequent amendments to Rule 44(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

Form Approved by the Judicial Council of California MC-275 (Rev. January 1, 1992)

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

[FILED Aug.21, 1997]

In re MARK WELDON, On Habeas Corpus.

B 114636
(L.A.S.C. No. LA018025)
ORDER

THE COURT*:

The petition for writ of habeas corpus, filed August 13, 1997, has been read and considered.

The petition is denied.

---

*SPENCER, P.J. VOGEL (Miriam A.), J. MASTERSON, J.

APPENDIX E

S067688

IN THE SUPREME COURT OF CALIFORNIA

[FILED June 24, 1998]

IN RE GERRY SAENZ
ON
HABEAS CORPUS

Petition for writ of habeas corpus is DENIED.

/s/
Chief Justice

Name Gerry Saenz K-18680

Address Dorm 314, Bed 21

California Rehabilitation Center

Norco Ca 91760

CDC or ID Number

California Supreme Court

[FILED Feb. 2, 1998]

Gerry Saenz Petitioner	PETITION FOR WRIT OF HABEAS CORPUS
vs.	
Jo Ann Gordon, Warden Respondent	No. S067688

INSTRUCTIONS — READ CAREFULLY

Read the entire form *before* answering any questions.

This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.

Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on a additional page."

If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.

If you are filing this petition in the Court of Appeal, file the original and four copies.

If you are filing this petition in the California Supreme court, file the original and thirteen copies.

Notify the Clerk of the Court in writing if you change your address after filing your petition.

In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(f)(1) of the California Rules of Court [as adopted effective January 1, 1992]. Subsequent amendments to Rule 44(b) may change the number of copies be furnished the Supreme Court and Court of Appeal.

Form Approved by the Judicial Council of California MC-275 (Rev. January 1, 1992)

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

[FILED Sept. 10, 1998]

In re GERRY SAENZ, E021087
COUNTY NO. CR70044

on Habeas Corpus

THE COURT:

The petition for writ of habeas corpus is DENIED.

McKINSTER [stamp]
Acting P.J.

cc: Superior Court Clerk, Riverside County, P.O. Box 431, Riverside, CA 92502

District Attorney Riverside County, 4075 Main St., Riverside, CA 92501

Attorney General, 110 West "A" St., Ste. 1100, San Diego, CA. 92101

Gerry Saenz
K-18680
P.O. Box 8503 C-2-206 Low
Pleasant Valley State Prison
Coalinga, CA 93210

APPENDIX F

Supreme Court of California

[Letterhead]

ROBERT F. WANDRUFF
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME COURT

June 26, 1997

Mr. Bobby R. Appleberry
#C-67823
P. O. Box 7300
Crescent City, CA 95531-7500

Re: B111487: In Re Bobby R. Appleberry on Habeas Corpus

Dear Mr. Appleberry:

The Supreme Court lost jurisdiction to act on a Petition for Review from the denial of your Writ of Habeas Corpus on June 16, 1997.

However, there is *no deadline* within which to file a Petition for Writ of Habeas Corpus. Therefore, you will not require an extension of time. Please send in your Petition for Writ of Habeas Corpus when you are able.

Very truly yours,

ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court

/s/

By: Patricia A. Quinn, Deputy Clerk

la/sf

APPENDIX G

Supreme Court of California

[Letterhead]

ROBERT F. WANDRUFF
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME COURT

January 21, 1997

Mr. Bobby R. Appleberry
#C-67823
P. O. Box 7300
Crescent City, CA 95531-7500

Re: B111487: In Re Bobby R. Appleberry on
Habeas Corpus denied May 15, 1997

Dear Mr. Appleberry:

Please be advised that our records do not indicate any filings by you in our Court whether by Petition for Review or by Petition for Writ of Habeas Corpus. Although Petitions for Review are jurisdictional and must be filed within specified time periods from decisions of the Court of Appeals, Petitions for Writ of Habeas Corpus can be filed at any time. Therefore, I am enclosing the form, Petition for Writ of Habeas Corpus, for your convenience.

Very truly yours,
ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court

/s/

By: Patricia A. Quinn, Deputy Clerk

paq/Enclosure
la/sf

APPENDIX H

Supreme Court of California

[Letterhead]

ROBERT F. WANDRUFF
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME COURT

July 2, 1997

Mr. JefferyD. McClure
#D-75472
44750 60th Street West
Lancaster. CA 93536-7620

Re: B111905: In Re Jeffery D. McClure on Habeas Corpus

Dear Mr. McClure:

The Supreme Court lost jurisdiction on June 23, 1997, to act on a Petition for Review from the Second Appellate District's denial of May 22, 1997 of your Writ of Habeas Corpus.

However, you may file a Petition for Writ of Habeas Corpus with this Court at any time. Enclosed is a copy or the form Writ of Habeas Corpus (Judicial Council Form 56.5) for your convenience. Please fill out and *sign the form* on Page 6 and return it at your convenience.

As to your request for provision of copies of the Petition for Writ of Habeas Corpus filed in the Court of Appeals, we are unable to do so. If you are unable to make sufficient copies of this Writ and exhibits, please send one of each document.

Very truly yours,

ROBERT F. WANDRUFF
Court Administrator and
Clerk of the Supreme Court

/s/

By: Patricia A. Quinn, Deputy Clerk

Enclosure/la/sf